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Supreme Court of the United States

OCTOBER TERM, 1979

The COUNTY OF LOS ANGELES, a political subdivision of the State of California, *et al.*,
Petitioners,

v.

Hon. F. RAY MARSHALL, Secretary of Labor of the United States, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Hon. F. RAY MARSHALL, Secretary of Labor of the United States, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

In this petition, the States of South Carolina, Alaska, Missouri, Nebraska, New Hampshire, New Mexico, Utah, and the County of Los Angeles, California, and some 1750 local governments in 44 States,[1] seek review and

[1]In conformance with Rule 21 of this Court, the Certificate required by Rule 8(c) of the General Rules of the Court of Appeals for the District of Columbia Circuit (listing the some 1750 parties below) has been lodged with the Clerk of this Court, with a copy served on the Solicitor General of the United States.

Amici curiae below, all presumed urging reversal by this Court are: National Institute of Municipal Law Officers, International City Management Association, National Association of Counties, National Association of Towns and Townships, National League of Cities, National School Boards Association, United States Conference

(footnote continued)

reversal of the judgment of the Court of Appeals (March 19, 1980) affirming dismissal of their complaint and holding that a federal requirement that each state impose an unconstitutional tax on itself and its political subdivisions as employers, in order to preserve a federal tax credit for private-sector employers which since 1935 has funded a program of unemployment benefits for private-sector employees, is not unconstitutionally coercive of state action. The Court of Appeals reached this conclusion even though the denial of that credit will result in "economic suicide" by a nonconforming state, since the selective federal tax increase will result in an exodus of private-sector employers and employees.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Mar. 19, 1980) affirming dismissal of the complaint is unreported, and is reprinted (as Appendix A, with letter of even date that the judgment had been entered on March 19 as Appendix B) at page 1a of this petition. That opinion adopted "as fully applicable" the February 20, 1980 opinion of the United States Court of Appeals for the First Circuit in *State of New Hampshire, etc.* v. *Marshall;* the *New Hampshire* opinion is reported at 616 F.2d 240, and is reprinted (as Appendix C,

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of Mayors, National Governors' Association, and International Personnel Management Association.

In addition to the Secretary of Labor, appellees below were: Hon. W. Michael Blumenthal, Secretary of the Treasury, Hon. Jerome Kurtz, Commissioner of Internal Revenue, and (jointly) the State of Michigan and the American Federation of State, County and Municipal Employees and AFL-CIO, all presumed to urge affirmance here. It should be noted that, notwithstanding the alliance of Michigan's Attorney General with the union intervenors, 31 Michigan local governments are here as petitioners.

with the decree of even date as Appendix D, and correction sheet dated March 10, 1980 as Appendix E) at page 8a of this petition. *New Hampshire* is here on appeal as No. 79-1846 (juris.state. filed May 20, 1980).

The Order of the District Court for the District of Columbia (March 7, 1978) dismissing the complaint in this case is unreported, and is reprinted (as Appendix F) at page 29a of this petition. That Order referred to, and adopted, conclusions of law in the District Court's Memorandum Opinion (Appendix G) and Order (Appendix H) of December 29, 1977, denying preliminary injunctive relief, reprinted at page 32a of this petition and reported at 442 F.Supp. 1186.

JURISDICTION

This petition is filed within 90 days of the entry of judgment in the Court of Appeals for the District of Columbia Circuit (March 19, 1980).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did Congress, in retaining a constitutionally-based exemption of state and local government employers from the payroll tax imposed by the Federal Unemployment Tax Act (FUTA) but providing that private employers would be denied a FUTA credit given since 1935 (and that their employees would be denied all federally financed unemployment benefits) unless the several states levied a tax sufficient to fund a program of unemployment benefits for state and local government employees, meeting federal standards, intend a tax upon state and local government employers?

2. If the Congress intended such a tax, is it constitutional and is the FUTA's unique method of insuring its collection and transmission into the federal Unemployment Trust Fund in the treasury of the United States violative of the Tenth Amendment, intergovernmental tax immunity and other federalism-based constitutional guarantees?

3. Does the continuation of a longstanding FUTA credit for private employers and the use of their noncredited FUTA tax payments, conditioned on payment of a tax by government employers exempt from the FUTA, violate the Due Process Clause of the Constitution, notwithstanding this Court's decision 43 years ago in *Steward Machine Co.* v. *Davis,* 301 U.S. 548, in that:

(a) *Steward* upheld the predecessor of the FUTA applying a payroll tax to private employers;

(b) the amendments challenged here apply the FUTA benefit program to state and local government employers and their employees by mandating that state and local governments pay sums from their tax-raised budgets for transfer to the federal Unemployment Trust Fund to fund unemployment compensation for public workers equal to that paid private employees, despite *National League of Cities* v. *Usery,* 426 U.S. 833;

(c) the evidence of record proves that state employment practices and unemployment compensation plans for their public employees crafted over the years according to state and local conditions perform so well that public employment is favored over private employment by most employees and a 1% unemployment rate admittedly exists for permanent state and local government employees;

(d) this Court in *Steward* distinguished, as unconstitutional, federal enactments which "impair[ ] the autonomy of the states" (301 U.S., at 586), given the case here that the state can only ransom its private industry now held hostage by the challenged amendments by adopting "a statute unrelated in subject matter to activities fairly within the scope of national power and policy" (*Steward,* 301 U.S., at 590)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, and of the Federal Unemployment Tax Act, as amended, are set out in Appendix I, *infra,* 48a.

STATEMENT

Introductory

The federal unemployment law was most recently amended in 1976 (effective January 1, 1978), Pub.L.No. 94-566, 90 Stat. 2667;[2] section 115 of that amendment created a plenary public-sector unemployment benefit program requiring the states to fund a program of unemployment benefits for workers of state and local governments as an added condition to the annual approval of state laws necessary for continuation of a longstanding federal tax

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[2]Minor technical amendments were made in Pub.L.No. 95-19, 91 Stat. 39 (1977).

The omnibus 1976 amendment was foreshadowed by a more limited amendment in 1970, Pub.L.No. 91-373, 84 Stat. 695. Both were challenged below. The enforcement mechanism is the same for the 1970 and 1976 amendments. Therefore, we speak principally of the 1976 amendments, although we assert both are unconstitutional.

credit for private employers. The public sector program is challenged in this case. Neither the private sector program, the congruence between state taxes on private employers and the corresponding federal tax credits, nor the congruence between the private-sector employers who pay federal taxes and their employees required to be paid benefits under federally approved state laws, was challenged below. Nor is the power of the federal government under the Spending (General Welfare) Clause, Art. I, §8, cl.1, of the Constitution to place conditions on grants to support the private-sector unemployment laws of the states — or the substance of any private-sector program condition established since 1935 — at issue.

Petitioners filed the instant case on November 28, 1977, invoking the jurisdiction of the District Court under 28 U.S.C. §§ 1331 and 1340. The case arises under the Federal Unemployment Tax Act (FUTA), §§ 3301 *et seq.* of the Internal Revenue Code of 1954. The District Court dismissed the complaint on jurisdictional grounds, applying the bar of the Anti-Injunction Act, IRC § 7421(a),[3] to what the court perceived as a challenge by state and local governments to the federal tax sanctions (under §§ 3301, 3302 of the Internal Revenue Code) which would be imposed on private-sector employers if the states refused to conform to the substantive federal mandate (§§ 3304(a)(6)(A) and 3309, added by the FUTA amend-

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[3]Unless otherwise indicated, all statutory citations are to sections of the Internal Revenue Code of 1954, as amended, 26 U.S.C.

Section 7421(a) of the Internal Revenue Code provides in relevant part: "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

Title 28 U.S.C. § 2201 imposes a similar tax-exception to the awarding of declaratory relief.

ments), the constitutionality of which was drawn into question on federalism and Tenth Amendment grounds.

The Court of Appeals, in addressing the constitutional merits, found federal jurisdiction, App. A, *infra,* 5a, impliedly under 28 U.S.C. § 1331, but affirmed on the ground that the substantive federally mandated taxes on state and local government employers, and the federal tax sanctions on private employers, were constitutional, App. A, *infra,* 6a, on the authority of *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937).

The 1935 Social Security Act created a private-sector unemployment benefit program, and was upheld by this Court, 5-to-4, in *Steward, supra.* The public-sector amendments mandate that states take moneys from their tax funds and tax funds of their local governments and pay them into the Unemployment Trust Fund in the treasury of the United States in Washington, D.C. in such amounts as will pay for unemployment compensation for their employees equal to that received by private employees.[4].

Preempted are the outstanding programs state and local governments already have, including compensation, civil service, severance pay, other unemployment and personnel plans crafted over many years according to their local experience and needs. These offer a program which has been described as a "comparability" compensation system designed to compete with private employers located within the jurisdiction of each state and local government.[5]

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[4] § 3304(a)(6)(A).

[5] Affidavit of Colman ¶ 13 (introduced in the District Court below).

Prior to federal involvement in state and local government unemployment benefit practices, 29 states voluntarily had financed benefits for their state employees, and 8 states had required their

(footnote continued)

To bring their 12,905,000 employees under FUTA would cost state and local governments $385 million per year, federal respondents admit, but petitioners place the annual cost at over one billion dollars with rapidly growing future increases. The FUTA amendments subject state and local governments to the same federal personnel controls now applicable to the private sector.

Some states, adopting the congressionally mandated statute, expressly stated they did so *not by choice* but only because forced or coerced to avoid federal destruction of the economic existence of their private industrial tax base through imposition of a federal penalty on their private-sector taxpayers. This is because Congress in the FUTA amendments sought to avoid the appearance of violating the constitutional tax immunity of state and local governments by expressly stating that states are exempt from the FUTA tax[6] and by not calling the said statutorily mandated sums extracted from state and local governments a "tax,"[7]

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political subdivisions to follow suit. H.R. Rep. No. 755, 94th Cong., 1st Sess. 41 (1975). These state programs not required by federal law were in addition to city and county programs of unemployment compensation, severance pay and substantial fringe benefits provided voluntarily in excess of state law to meet the "comparability" doctrine referred to by expert witness Colman. Nonetheless, each state's public-sector unemployment law had to be amended to conform with the particular rules of the 1976 FUTA amendments.

[6]IRC § 3306(c)(7).

[7]The Congressional Research Service of the Library of Congress advised the Senate Finance Committee that the challenged FUTA amendments are probably unconstitutional under *National League of Cities v. Usery*, 426 U.S. 833 (1976). Constitutionality of State and Local Coverage: CRS Memorandum, reprinted in Staff Data and Materials on Unemployment Compensation Amendments of 1976 (H.R. 10210), 94th Cong., 2d Sess. 111 (Comm. print 1976). But the Congress relied on a contrary opinion of the Solicitor of the Labor Department. Constitutionality of State and Local Coverage: Labor Department Opinion, *id.*, at 95.

and by imposing direct penalties of over eleven (11) billion dollars per year, not upon states for state inaction but upon private-sector employers, for the states' refusal to adopt the state statute required by the challenged federal amendments.

In oral argument in *Steward, supra,* Assistant Attorney General Jackson spoke of the state taxes there paid into the United States treasury as ". . . this Federal money which the Federal Government has refrained from collecting by giving this credit . . . ." Arguments in the Cases Arising Under the Social Security Act, etc., S.Doc.No. 53, 75th Cong., 1st Sess. 111 (1937).

A. The Private-Sector Program's Statutory Scheme Upheld in *Steward Machine Co.* v. *Davis*

Since 1935, the Federal Unemployment Tax Act (or its predecessor provisions) has imposed on private sector employers a putative tax, now 3.4%.[8] Since 1935, state and local government employers have been exempted from the federal tax,[9] as has the federal government.[10] The putative 3.4% federal tax has never been collected in full,[11] because a credit of up to 2.7% (or 79% of the tax) is

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[8]Internal Revenue Code of 1954 § 3301. The tax, originally part of the Social Security Act and originally 1% rising to 3% has been recodified as part of the Internal Revenue Code of 1954 and its base has been first limited then expanded to include the first $6000 of wages paid annually to each covered employee. IRC § 3306(b)(1).

The maximum credit against the federal tax is 90% of the original 3.0% federal tax. Although the federal tax rate has increased to 3.4%, the maximum credit remains 2.7% (or 79% of the federal tax). IRC §§ 3302(c)(1) & (d)(1).

[9]IRC § 3306 (c)(7).

[10]IRC § 3306 (c)(6).

[11]Deft. Response to Request for Admissions 4 (No. 7).

provided for private employers in states which have enacted unemployment compensation laws satisfactory to the federal Secretary of Labor.[12] Each state has conformed to each of the several federal amendments to the private sector unemployment program enacted since 1935.[13]

The FUTA establishes detailed conditions, both requiring and limiting the payment of benefits to occupational groups and to those engaged in activities the Congress wished to affect.[14]

Since in 1935, as today, the FUTA tax could not constitutionally be applied to state and local government employers,[15] government employers received no FUTA credit.

These provisions of the Social Security Act of 1935, imposing the tax on private employers and crediting it upon state enactments, were upheld in *Steward, supra;* the provisions of Alabama's private-sector unemployment law conforming to federal requirements were upheld in *Carmichael* v. *Southern Coal and Coke Co.,* 301 U.S. 495 (1937).

The Steward Machine Company and Southern Coal and Coke Company were subject to both federal and state unemployment taxes, and benefited from the federal tax credit provisions. Alabama, for its passage of a state unemployment tax and benefit law meeting federal requirements, secured the federal tax credit for the com-

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[12]IRC §§ 3302, 3304(a), (c).

[13]The state tax rates have congregated around the maximum federal credit; under present federal law, the paradigm state tax rate on private sector employers is 2.7% of the federal payroll base. *See,* note 30, *infra.*

[14]IRC §§ 3304(a)(13), 3304 (a)(5).

[15]IRC §§ 3306(c)(7). *See also,* S.Rep. No. 1265, 94th Cong. 2d Sess. 8-9 (1976).

panies, and secured for itself federal grants – financed by part of the federal tax above the 2.7% maximum credit – to staff the unemployment benefit claims offices, and for other administrative expenses. These grants were subject to independent federal law requirements, as they are today.[16]

B. Federal Requirement of an Unemployment Benefit Program for Public-Sector Employees

The first addition of a federal requirement that the states create a program of unemployment benefits for the workers of a class of employers not subject to the FUTA tax[17] came in 1970 with the addition of § 3309 of the Internal Revenue Code to include employees of state-owned universities and hospitals.[18] In 1976, § 3309 was amended to include all employees of state and local governments.[19]

Under the statutory scheme challenged in this case, state and local governments remain expressly immune from the FUTA tax. IRC §3306(c)(7). However, under §§3304(a)(6)(A) and 3309, a state law will not be approved by the Secretary of Labor for federal tax credit to private-

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[16]42 U.S.C. §§501 *et seq.* and 1101 *et seq.*

[17]In contrast, the 1976 FUTA amendments included farm-workers and domestic workers in the traditional congruent fashion: their employers were made subject to the FUTA excise tax, and state laws would have to provide benefits for the employees in order to secure the federal approval necessary for the FUTA credit.

[18]The 1970 FUTA amendments paralleled generally the 1966 amendments to the Fair Labor Standards Act, upheld in *Maryland v. Wirtz,* 392 U.S. 183 (1968).

Similarly, the 1976 FUTA amendments paralleled the 1974 amendments to the FLSA, declared unconstitutional in *National League of Cities v. Usery,* 426 U.S. 833 (1976), overruling *Maryland, supra.*

[19]Limited exemptions are provided in § 3309(b) for confidential policymakers and others.

sector employers which does not finance a program of unemployment benefits (equal to benefits paid private-sector workers) for the workers of governments.[20]

The several states complied with the FUTA requirements by levying a payroll tax on state and local government employers.

The state tax payments of state and local government employers (like those from the private sector) are covered into the federal Unemployment Trust Fund in the United States treasury.[21] The Trust Fund (in accordance with Art. I,§9,cl.7 of the Constitution) can be invaded only by congressional appropriation. No distinction is made in the Trust Fund between state taxes paid by private-, and by public-sector employers.

C. The Cost of Compliance with Federally Mandated State Law Taxes

In general, the rules developed over 40 years of application to the private sector are applied without change to the required coverage of state and local government employees.[22]

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[20]In the private sector, a supplemental program of extended benefits is in part financed by the federal government. Under the FUTA amendments challenged here, public workers must be provided the extended benefits but the federal government will not contribute toward the cost, since it is contended that the mandated sums from state and local governments are not a FUTA tax. IRC §§ 3304(a)(11). Pub.L.No. 91-373, § 204 (a)(4), 84 Stat. 708, 26 U.S.C. § 3304 note.

[21]IRC § 3304 (a)(3).

[22]The limited exceptions of IRC § 3309(b) are similar to those of § 3(d) of the Fair Labor Standards Act, U.S.C. § 203(d), declared unconstitutional in *National League of Cities* v. *Usery,* 426 U.S. 833, 839 (1976). Here, as there, the exceptions do not diminish the pressure

State and local employees in the classified civil service were generally covered under state unemployment benefit laws and programs well before the federal requirement to do so in the FUTA amendments.[23]

The lowest estimate of the cost of conformance by governments' paying unemployment benefits under the amendments was $385,000,000 annually.[24] Estimates by federal, state and local government experts of the benefit cost exceeded the $1 billion annual cost reported to this Court in *National League, supra.*[25]

The 1% unemployment rate of permanent employees in state and local government is far less than the private-sector rate. The source of the billion dollar annual cost to government employers is temporary, seasonal and part-time employees, hired largely not because of their efficiency, but because of the social benefit of training them and releasing them to the permanent, public or private, workforce. For these employees, unemployment after

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on local government budgets of the federal requirement that these confidential policymakers use their fiscal power to fund a benefit program for almost all other public workers. In any event, none of the courts below regarded § 3309(b) as enhancing the constitutional validity of the FUTA amendments.

[23]The record in *State of New Hampshire v. Marshall,* No. 79-1846, juris. state. filed May 20, 1980, explores in detail the voluntary public sector law of one state, and the changes – and their attendant cost – required by the FUTA amendments.

[24]Affidavit of Federal administrator Weatherford, ¶ 12; Tr., Dec. 20, 1977, p. 84. (federal expert witness Van Erden).

[25]*See,* S. Rep. No. 1265, 94th Cong., 2d Sess. 37 (1976) (Congressional Budget Office estimate of $900 million annually for fiscal years 1980 and 1981). *See also,* Affidavit of expert witness Moak ¶ 8d ($1.9 billion) (40% already financed under voluntary state laws enacted before the FUTA amendments); Affidavit of expert witness Lissenden ¶ 2 ($1.8 billion cost of required coverage financed by contributory tax method).

temporary work comes as no surprise, and is, in fact, both predicted and mutually agreeable.[26]

In order to raise the needed funds each year for unemployment coverage, some state and local governments must seek substantial tax increases.[27] State constitutional and statutory prohibitions against deficit spending and limitations on tax increases force others to layoff present employees and curtail existing, essential governmental services,[28] and to alter government organization and personnel practices.[29]

While each of the states has conformed its law to the federal requirements of a public worker benefit

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[26]*Cf.* the Solicitor General's justification for an unemployment benefit program in *Steward.* Brief for the [federal] Respondent 12, No. 837, Oct. T. 1936 ("The loss comes to him as a disaster over which he has and can have no control.").

[27]*See,* Affidavit of Colman ¶ 3.

[28]*See,* Affidavit of Benninghoven ¶ 11.

In his testimony on the pending bill Mayor Beame of New York City explained the counterproductive effect of the federal mandate on financially troubled cities: "At the state benefit maximum of $95/week, for every one thousand employees laid off, we would incur an unemployment benefit obligation of $3,705,000. At an average salary plus benefits of $15,000, an additional 247 employees would have to be terminated to finance the [Unemployment Insurance] benefits for the first thousand – and an additional 61 employees to finance the UI benefits of the 247. Thus, one additional worker will face the loss of his or her job for every three laid off to meet budget requirements.

"The meaning of this cruel arithmetic is that H.R. 10210 would add to the unemployment problem in the very areas where joblessness already has become critical. In that regard, the bill undermines the aims of the recently enacted Public Works Employment Act and other programs targeted to assist economically depressed areas." Hearings Before the Senate Comm. on Finance on H.R. 10210, Unemployment Compensation Amendments of 1976, 94th Cong., 2d Sess. 14 (1976).

[29]*See,* Affidavit of Colman ¶¶ 3, 19; Ex. B, at 47, 50.

program, [30] many states conformed with disclaimers indicating coercion, and "self-destruct" clauses providing that the state public-sector provisions would be repealed upon a court's injunction against enforcement of the federal tax sanction against private employers.

If the several states had not conformed, and had not agreed to pay at least $385 million to $2 billion annually into the federal treasury, the denial of FUTA credit to their private employers would have amounted to a penalty of $11.5 billion annually.[31]

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[30]New Hampshire for a time refused to conform and accordingly was decertified by the Secretary of Labor under § 3304. New Hampshire's entire unemployment program, public- and private-sector, was decertified on October 30, 1978. After a statutory stay expired, the Secretary of the Treasury and Commissioner of Internal Revenue would have been free to collect from New Hampshire's private employers a $40 million added federal tax annually. App. C., *infra,* 18a. The First Circuit on January 22, 1979 entered an order continuing indefinitely the stay of collection of federal tax penalties in New Hampshire. Even though collection has been stayed, the penalties continue to accrue.

An appeal from the judgment of the Court of Appeals upholding decertification is before this Court as No. 79-1846, *State of New Hampshire* v. *Marshall,* juris. state. filed May 20, 1980.

New Hampshire is negotiating with the Secretary of Labor the forgiveness of the federal tax penalties accruing against private employers in that state. The new Governor of New Hampshire has, since early 1979, persistently tried to settle the decertification and the state's appeal. The First Circuit Court of Appeal's decision must be read in the light of the Governor's concession of respondents' claims in an attempt to preserve for his private taxpayers what is now over $80 million, a great sum for that state.

[31]Not only would the private sector's federal tax bill increase by $11.5 billion by the denial of the FUTA credit, but FUTA and the Social Security Act prohibit any use of either the penalty increment or the normally noncredited FUTA tax (0.7%) in nonconforming states, 42 U.S.C. §§ 503, 1103(b)(1), for either benefits or administration.

In such a circumstance, there would be no federally financed private-sector unemployment benefit program.

(footnote continued)

D. Proceedings in the Courts Below

In order to prevent application of the federal mandate to state and local governments, 7 states and some 1750 local governments sought, prior to the effective date of the FUTA amendments, injunctive relief and a declaration that the FUTA requirement of a public sector unemployment benefit program was unconstitutional.

The District Court denied injunctive relief 3 days prior to the January 1, 1978 effective date of the FUTA amendments. App.G, *infra,* 32a, 442 F.Supp. 1186. The Court of Appeals and The Chief Justice of the United States, sitting as Circuit Justice, No. A-565, Oct. T. 1977, declined to issue a stay pending appeal.[32] The District Court dismissed the complaint, applying the jurisdictional bar of the Anti-Injunction Act, IRC § 7421(a).[33]

When appeals were argued in the Court of Appeals on February 14, 1979, the panel inquired about the petition

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Conforming state legislation was prompted at least in part by lobbying pressure by private employers to avoid this senseless fivefold increase in federal tax on them.

[32]The Court of Appeals also denied a renewed request for stay a year later, in December 1978.

[33]The District Court did, however, determine that the legal and financial constraints on state and local government budgets "*may* induce the states and local governments to raise the needed revenue by curtailing or eliminating government services and by firing government employees." App. G, *infra,* 34a (emphasis original).

The District Court concluded that these impacts were of no moment — and *National League* was not applicable — because "the consequences of refusing to enact the legislation are a denial of a tax credit to private employers and the loss of some federal funds." App. G, *infra,* 39a, n.2. Thus, the District Court concluded, "the consequences of not enacting the legislation will not interfere with the states' sovereignty." *Ibid.*

then recently docketed in the Court of Appeals for the First Circuit, to review New Hampshire's refusal to conform to FUTA's government unemployment program requirements. That case was decided on February 20, 1980 and is presently here as No. 79-1846, *New Hampshire Department of Employment Security* v. *Marshall* (juris. state. filed, May 20, 1980).

The Court of Appeals below awaited a decision by the First Circuit "[i]n the interest of inter-circuit comity and the concomitant husbanding of scarce judicial resources"[34] while recognizing that "[t]he First Circuit's decision was delayed by the representations of the parties that settlement negotiations were proceeding."[35]

After the Court of Appeals for the First Circuit rejected jurisdictional and prudential defenses, but upheld the constitutionality of the FUTA amendments (February 20, 1980), the Court of Appeals below (March 19, 1980) adopted the entirety of the First Circuit's reasoning as its own.

The First Circuit reasoned that in 1935 the several states were reluctant to create an unemployment benefit program for private-sector employees "fearing that the tax on local employers would cause them to flee to other states which did not have such a law."[36] The FUTA, by imposing a federal tax on private employers which would be collected in full in the absence of an offsetting state tax, removed the competitive advantage of industries in the less gracious states.

Rejecting the argument of New Hampshire that the threat of penalties to secure payment by governments ex-

[34]App. A, *infra*, 5a.

[35]*Ibid.*

[36]App. C, *infra*, 8a.

empt from the FUTA tax, by "holding the private employers 'ransom'," [37] constituted a quite different form of coercion of state legislation, the Court concluded "[t]he basic design and mechanism of the Act have not changed since 1935." [38]

The First Circuit concluded also that *National League* was limited to congressional enactments under the Commerce Clause, [39] and would be limited – presumably in a Commerce Clause case – to federal enactments which "set the wage rates or affect hours worked" of public sector employees. [40]

To this, the Court of Appeals below added:

> "That reasoning – correctly, we think – rests upon the proposition that *Usery,* involving a mandatory imposition on state and local governments bottomed upon the commerce clause, is wholly distinguishable, and diminishes in no way the authority of *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937) – the case which upheld the scheme of federal-state cooperation founded upon the spending power and embodied in FUTA as it was originally enacted. The voluntary and wholly optional aspect of that scheme persists in full measure under the 1976 amendments, and serves to defeat the contentions advanced by appellants of coercion and improper transgression upon the sovereignty of the states shielded by the Tenth Amendment." [41]

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[37] App. C, *infra* 18a.
[38] App. C, *infra,* 18a-19a.
[39] App. C, *infra,* 20a.
[40] App. C, *infra,* 23a.
[41] App. A, *infra,* 6a.

REASONS FOR GRANTING THE WRIT

We agree with the District Court (App. G, *infra,* 33a) that "[t]his litigation is of monumental significance."[42]

We start with the admission by Congress in IRC §3306(c)(7) that it could not constitutionally impose the FUTA tax on state and local governments as employers. See also, S. Rep. No. 1265, 94th Cong. 2d Sess. 8-9 (1976).

The payment by state and local governments of a state tax into the federal treasury has all the indicia of a federal tax on government operations.

The Solicitor General explained to the Court in *Steward, supra,* that the unemployment compensation program should be considered solely as an exercise of the federal taxing power. For the convenience of the Court, pages 29-30 and 40-43 of the Solicitor General's Brief for the [federal] Respondent in *Steward.* No. 837, Oct. T. 1936, are reproduced as Appendix J, *infra,* 58a.

Since no state can compete economically with the other states under these circumstances of nonconformance (a full FUTA 3.4% payroll tax on private employers, no 2.7% FUTA tax credit, no FUTA-financed unemployment compensation and no FUTA-financed administrative costs),[43] all states have "ransomed" their "hostage" private industry by taxing state and local

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[42]We note also that in *Steward,* the Solicitor General did not oppose certiorari and sought a prompt review of the application of the federal taxing power to secure state legislation. Mem. for the [federal] Respondent 1, No. 837, Oct. T. 1936. See also Mem. for the Respondent, *Massachusetts* v. *United States,* No. 76-1500 (on the merits, 436 U.S. 444, upholding user fee as not implicating tax immunity).

[43]The FUTA finances $900 million annually in federal support for the private-sector unemployment program. *See,* App. C, *infra,* 20a, n.10 (as corrected, App. E, *infra,* 28a).

government employers. Pending decision by this Court, they have given up their constitutional right to be immune from federal exactions on their tax funds. They have turned over the required funds to the federal government to save their industry and their states from economic ruin.

The constitutional questions presented are substantial. They involve all state and local governments and nearly all their public officers and employees.

The writ should be granted because of the importance of this statute, bringing as it does every state and local government in the nation under control of the Secretary of Labor and at respondent's admitted cost of at least $385 million annually (and as much as $2 billion annually according to petitioner's experts), the payment of which is secured by the threat of a penalty of $11.5 billion. And review is warranted because the constitutional issues involved are not limited to this case, but are clearly a test of a new idea to scuttle state sovereignty as recognized in *Fry* v. *United States,* 421 U.S. 542 (1975) and *National League, supra.*

We agree with the statement of Mr. Justice Rehnquist, dissenting in *Fry, supra,* that "where the Federal Government seeks not merely to collect revenue as such, but to require the State to pay out its moneys to individuals at particular rates, not merely state revenues but also state policy choices suffer." 421 U.S., at 554.

State and local government employers have been financing, since early 1978, a program of unemployment benefits under the terms of the FUTA, which these government employers and the legislatures of their states assert is unconstitutional. Although paying under protest, these government employers have no practical method of recouping the moneys used to pay benefits while the FUTA amendments remain unreviewed.

The relevant inquiries in assessing the constitutionality of the FUTA amendments are two: (1) whether Congress intended the coverage of government employees, secured by the threat of federal tax sanctions on private employers, to be susceptible of a choice by the states whether to conform; and (2) whether a program intended not to be voluntary, and in fact not voluntary, violates the protections of federalism articulated in *National League, supra,* as well as the Guaranty Clause, Art. IV § 4, of the Constitution.

It is unclear which of the two questions the courts below addressed. It is clear to us that *Steward, supra,* is relevant to both questions. It is our submission that neither the Congress in 1935 nor the Court in *Steward* had in mind a program of public worker benefits financed under FUTA.[44] The Congress in the 1970's, to the contrary, had this result firmly in mind. And, we submit, both Courts of Appeals, acting as they did in tandem, misapplied *Steward* as foreclosing meaningful review of these later enactments.

This case is no more governed by the private-sector precedent of *Steward* than was *National League, supra,* governed by *United States* v. *Darby,* 312 U.S. 100 (1941).

[44]Mr. Robert H. Jackson stressed that the Act considered in *Steward* would "not upset and unbalance our dual form of government" and that application of the FUTA in the private sector would protect "the freedom of the states," obviating the "freedom to commit industrial suicide." (Excerpts, 301 U.S., at 566). Earlier he had represented to this Court "This law does not operate upon the States. This law operates upon the taxpayers who are citizens of the United States and subject to its taxation." 301 U.S., at 565-566. *See also,* text of argument of Mr. Charles E. Wyzanski for federal respondents, reprinted in Arguments in the Cases Arising under the Social Security Act, etc., S. Doc. No. 53, 75th Cong., 1st Sess. 99 (1937) ("The other exemptions from the statute are not really attacked by those who oppose us in the cases at bar . . . .Employment by a State is not included within the scope of the Act, for the obvious reason that the Constitution forbids the Federal Government to tax people who work for State governments.")

Much more difficulty results when the federal government is collecting a FUTA tax of 3.4%, unspendable in nonconforming states, with no tax credit or unemployment benefits and expenses allowed. No state can impose another unemployment payroll tax atop FUTA upon its private employers and expect those employers not to move elsewhere for economic reasons or simply to go out of business. The "economic disadvantage" created by a failure, unrelated to the private-sector program, to pay the required "ransom" really creates a pressure on the state where "choice becomes impossible," (*Steward, supra,* 301 U.S., at 589-590), a situation which Mr. Justice Cardozo clearly implied would invalidate a federal statute.

This alone would raise a substantial federal question worthy of plenary review by this Court. But, as we point out, the conjunction of an enforcement method which reaches taxpayers and a congressional object of regulation in an area where mandatory federal rules are constitutionally forbidden, is one which is capable of repetition. If a patina of voluntariness in the structure of the statutory scheme is not scratched – as the courts below refused to scratch – such a conjunction of indirect means and directly forbidden ends will evade review.[45]

The issue should be settled. This Court must decide whether states and their local governmental budgets are to be spent as the elected representatives of state and local taxpayers decide, or as some federal Labor Department employee in Washington dictates. If an intention by the Congress to coerce state action is constitutional, then the

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[45]Twenty states objected formally to the FUTA amendments, but conformed until judicial relief could be obtained. New Hampshire refused for a time but thought better of a $40 million annual cost to its private employers as the price for intergovernmental tax and regulatory immunity.

states must send to the United States treasury $385 million to $2 billion yearly under this unemployment program, and conform to all future congressional "hostage" enactments. If such an intention by the Congress exceeds its power, the Congress should know that now.

I

THE PROPER RULE TO BE APPLIED IN DETERMINING WHETHER CONGRESSIONAL LEGISLATION IS UNCONSTITUTIONALLY COERCIVE OF STATE ACTION INCLUDES AN ANALYSIS OF THE INTENT OF CONGRESS

Nothing in the conclusions of the courts below that "the basic design and mechanism of the Act have not changed since 1935"[46] adverted to the intent of Congress in the 1970's in enacting the FUTA amendments creating a public worker benefit program.[47]

Here the Congress plainly expressed its intention to circumvent this Court's decision in *National League* and to offer no more choice to the states in this employment program than in the one declared unconstitutional in *National League.*

Both the House (H.R. Rep. No. 755, 94th Cong., 1st Sess. 14) and Senate (S.Rep.No. 1265, 94th Cong., 2d Sess. 1,7-9) committees proposed to *"require* States to extend [unemployment] coverage to all State and local employment." (emphasis added).

The House passed H.R. 10210 before the decision of this Court in *National League.* Two months after that decision, the Senate Finance Committee published Staff Data and Materials on Unemployment Compensation Amendments of 1976 (H.R. 10210), 94th Cong., 2d Sess. (Comm. print 1976), which reflected the understanding of

[46]App. C, *infra,* 18a-19a.

[47]Cf. *Fullilove* v. *Kreps,* 584 F.2d 600, 603 (CA 2 1978), cert. granted, No. 78-1007.

the purpose and effect of the House-passed act. Excerpts are instructive:

> "The bill would *require* the States to provide unemployment compensation coverage to all employees of State and local governments." (p. 25) "*The State laws would be required* to contain a provision [respecting teachers]." (p.26) "*The States would not be required to provide unemployment compensation* for employment prior to January 1978." (*ibid.*) (emphasis added).

These are certainly *not* the words of a voluntary election.

Perhaps most instructive is the next passage from the Senate Staff Data:

> "The Department of Labor estimates that $210 million in additional unemployment compensation would be paid in fiscal 1979 under this provision." (*Id.*, p. 26).

One hardly expects the Labor Department to predict so precisely the revenues to the federal treasury from a program for which there is a realistic possibility of state noncompliance.

The Report of the Senate Finance Committee itself, S.Rep. No. 1265, 94th Cong., 2d Sess. 7 (1976), clearly distinguished voluntary public-sector unemployment coverage from what was to be accomplished by the FUTA amendments:

> "[The act would] bring under the Federal-State unemployment compensation system the greater part of those jobs which are now exempt from the Federal unemployment tax and are conse-

> quently not now covered under State programs *except to the extent that States have voluntarily elected to provide such coverage."* (emphasis added).

This is quite different from the "inducement or persuasion" seen by this Court in *Steward.* This is mandatory language, not voluntary.

Both Congress and the Labor Department fully expected that the states would be forced to raise the money for the federally required (under IRC §3304(a)(6)(A)) public sector benefit program by taxes on public-sector employers.[48]

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[48]Sections 3304(a)(6)(B) and 3309(a)(2) require special payment options for public-sector taxpayers. *See also,* Staff Data and Materials on Unemployment Compensation Amendments of 1976 (H.R. 10210), 94th Cong., 2d Sess. 38 (Comm. print 1976) ("Under the bill, the state law would have to permit the employing [government] entity to pay for its coverage either through contributions equivalent to the State payroll tax or by reimbursing the fund for benefits paid to its former employees.").

The Labor Department distributed to each state a very precise draft of required state legislation, Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 — P.L. 94-566 (Unempl. Ins. Serv., U.S. Dep't of Labor, 1977). In explaining §§ 3304(a)(6)(B) and 3309(a)(2) to the state legislatures, the Labor Department (at p. 65) offered only variations on the method of payment by state and local government employers:

> "The Federal law allows governmental entities (State and local governments) to elect to pay contributions or to make payments in lieu of contributions (reimbursements). The State law may treat the State government as a whole as a governmental entity or it may treat the branches of the State government (executive, legislative, and judicial) and the agencies of the State government as governmental entities individually. The political subdivisions of a State must be treated as governmental entities individually and *must* each be given the option of electing contributions or payments in lieu of contributions (reimbursements)." (emphasis original).

The state legislatures saw the effect of the FUTA amendments in exactly the same way. For example, the California Legislative Counsel's digest, in the slip law version of A.B. 644 (1977), recites among the purposes of the state conforming bill:

> "(5) Provide for a pooled fund arrangement for local government entities to finance unemployment insurance coverage of their employees, and establish a Local Public Entity Employees Fund in the State Treasury to be continuously appropriated without regard to fiscal year for such purposes.
>
> "(6) Make related changes in the unemployment compensation law required to conform state law with the requirements of the Federal Unemployment Compensation Amendments of 1976 (Public Law 94-566).
>
> "(7) Provide that *the bill is deemed to be a federal mandate* within the meaning of specified provisions." (emphasis added).

The legislative history of the FUTA amendments themselves reflects no congressional finding of national need to impose these federal requirements on State and local governments.[49]

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[49]Under the symmetry of the complementary federal and state programs upheld in *Steward* and *Carmichael,* several groups of employees remained outside the federal guarantee of unemployment benefits financed by state taxes because their employers were immune from the federal tax against which the credit for state taxes was offered. Of the 3 largest groups, farm workers, domestic workers and employees of state and local governments, the employers of one — state and local governments — were constitutionally immune from the federal tax.

Effective January 1, 1975, the federal government funded unemployment benefits for these 3 groups of employees whose

(footnote continued)

The congressional expression of need for the challenged FUTA amendments was rather that financing unemployment benefits should be universal among employers, even if the federal taxing power could not constitutionally reach some of these employers.[50]

II

THE POWER OF CONGRESS TO ORDER THE INVOLUNTARY ADOPTION OF A PROGRAM OF BENEFITS BY STATE AND LOCAL GOVERNMENTS FOR THEIR EMPLOYEES WAS NOT DECIDED BY THIS COURT IN 1937 IN *STEWARD MACHINE CO.* v. *DAVIS*

The structure of the entire FUTA confirms the difference between the private-sector program upheld in *Steward* and the public-sector program. Governments are the only employers whose employees collect benefits under the rules of IRC § 3304, but who are constitutionally exempt from the FUTA tax, IRC § 3306(c)(7). Section 3306(c)(7) was before the Court in *Steward;* §3304(a)(6)(A) was not.[51]

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employers were immune from the federal tax. The Special Unemployment Assistance (SUA) program, Pub.L.No. 93-567, §201 *et seq.*, 26 U.S.C. §3304 note, was funded fully from federal general revenues, as distinguished from the unemployment taxes paid by private employers subject to both federal and state unemployment payroll taxes.

In this way, Congress made its case for including state and local government employees within the federal unemployment program, not in the challenged FUTA amendments, but in the enactment of a federal spending program involving none of the features challenged in the complaint in this case. *See, National League, supra,* 426 U.S., at 852, n.17.

[50]The Solicitor General in *Steward,* by contrast, saw a close correspondence between the required state laws and the federal tax credit. Brief for the [federal] Respondent 32, No. 837, Oct. T. 1936.

[51]In *Steward,* Mr. Justice Cardozo adverted, 301 U.S., at 584, to the exclusion of farm and domestic workers. His failure to mention the exclusion of public workers certainly suggests the existence of a

(footnote continued)

The Courts below held that a tax on governments claiming to be voluntary in words was necessarily voluntary in law, on the authority of *Steward.*

Steward represents the vicarious assertion of a federalism-based protection, not by the state, but by a private party objecting to federal regulation.[52] Indeed, the private party also objected to the state unemployment law complementing the federal provision upheld in *Steward* – at least the same counsel represented the employers in *Steward* and in *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495 (1937). The indifference of Alabama to the federalism claim in *Steward* was notable,[53] as were the settlement concessions of New Hampshire which formed the basis for decision in that case, a companion to the instant case.

The effect of the federal legislation on the states here is quite different from the private-sector program upheld in *Steward.*

In the program reviewed in *Steward,* the State of Alabama was not asked to spend money to conform to

qualitative difference between groups Congress easily could tax directly but did not, and groups Congress simply could not tax at all.

It seems to us that the prospect of a public worker program, indeed, a program involving any employers not susceptible to the federal taxing power, was not within the contemplation of the *Steward* Court.

[52]Assistant Attorney General Jackson at oral argument (extracts, 301 U.S., at 551) distinguished the Tenth Amendment issue in a proper case from the false federalism issue presented on review of the private-sector program in *Steward:* "This law does not operate upon the states. This law operates upon the taxpayers who are citizens of the United States and subject to its taxation." 301 U.S., at 565-66.

[53]*See also, California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, No. 79-97 (Mar. 3, 1980), slip op. 4, n.4, and accompanying text (effect of indifference of state to antitrust challenge to state enforcement of privately established resale price maintenance schedule).

federal law. Its employees, and the employees of its political subdivisions, were not required to be brought under Alabama unemployment law. If Alabama refused to conform to the private-sector requirements of the Social Security Act, it lost nothing it already had. Its private employers would pay a greater federal tax. Upon conformance with federal law (by taxing the Steward and Southern companies), Alabama received for its own administration 90%[54] of the total (state and federal) tax paid by those private employers, and grants from the remaining 10%.[55]

So, in the private sector program, the state is (financially, at least) indifferent whether it conforms; and private employers pay the same total of state and federal tax whether the state does, or does not, conform.[56]

When the Social Security Act was enacted in 1935, there was no question that the federal government could tax private employers. So, the Steward Machine Company failed the first requirement of "a showing . . . that[,] separated from the credit[,] the revenue provisions are incapable of standing by themselves." *Steward, supra,* 301 U.S., at 586.

Here, the revenue provisions of IRC §§ 3304(a)(6)(A) and 3309 – requiring a public worker benefit program – cannot stand by themselves; they stand, if at all, only as a lately added condition to the longstanding private-sector

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[54]In 1937, the credit was 2.7% and the tax 3.0%; today, the credit remains 2.7%, but the tax has risen to 3.4%.

[55]If Alabama did not want to tax its employers, it certainly would not have been swayed by the offer of a federal grant to staff the offices paying claims from the state payroll tax receipts.

[56]The Solicitor General so informed the Court in *Steward.* Brief for the [federal] Respondent 33, No. 837, Oct. T. 1936.

FUTA credit. And that is a "condition that a state may escape . . . through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power." *Steward, supra,* 301 U.S., at 590. Certainly it is not true in this case that "the [FUTA] tax and the alternative [a FUTA requirement of locally financed unemployment benefits for public workers] are approximate equivalents," 301 U.S., at 591, or are "within the scope of national policy or power," given the limitations expressed in *National League, supra.*

So, the *Steward* Court concluded, the challenge to the private-sector program failed also to satisfy the second "showing . . . that the tax and the credit in combination are weapons of coercion . . . of the states." 301 U.S., at 586.

The nature of the public-sector program created by the FUTA amendments is quite different. Congress lacks the power to tax state and local government employers directly. Conformance with the FUTA amendments under the hostage scheme costs the states and their political subdivisions, as employers, between $385 million and $2 billion annually. But nonconformance still affects only private employers as federal taxpayers. And, if a state fails to create the public worker program, private employees lose a program they have had since 1935,[57] not for any defect in their own program, but for the refusal of the state to tax its cities and counties.[58]

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[57]Conversely, conformance with the public-sector program requirement does not enhance the private employer's FUTA credit, or federal financial participation in the benefit program for his employees.

[58]In contrast, the statute reviewed in *North Carolina v. Califano,* 435 U.S. 962 (1978) (per curiam) provided a close connection between the planning requirement and the contemporary and prior subsisting grant programs made to depend on the planning. *See,* Motion of Sec'y of HEW to Affirm 10, No. 79-971.

In conforming to FUTA, on the other hand, state and local governments must give up their current compensation "comparability" plans they have developed by experience to make public employment competitive with the private sector. See *Steward, supra,* 301 U.S., at 588.

Moreover, in this case, unlike *Steward,* all the states, either as parties or as amici curiae through their national associations, have objected to the FUTA amendments.

The impact on state and local governments, in dollars of federally-mandated disbursements and in displacement of personnel policies, of the unemployment amendments, which was essentially conceded in and found by the courts below, approached the magnitude of the impact of the federal legislation declared by this Court in *National League, supra,* to violate the Tenth Amendment and the concept of federalism.[59]

It is fair to say that, to the courts below, the federal program invalidated in *National League* would be constitutionally unobjectionable if it were reenacted in the form of a federal tax on private employers sufficient by its forgiveness to secure "voluntary" acquiescence in the federal program by tax-exempt state and local governments.

In *Steward,* Assistant Attorney General Jackson would not have gone so far. In support of the federal power to offer a tax credit to encourage private action, he offered the analogy of charitable deductions from income tax for individual taxpayer contributions to churches. But he recoiled at the proposition that a federal "religious board"

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[59]A governmental action affecting between 1% and 5% of personnel budgets is "substantial," *Committee for Public Education* v. *Regan,* No. 78-1369 (Feb. 20, 1980) (Blackmun, J., dissenting, slip op.4).

could condition the deduction on its dedication to a specific religious denomination, or that the religious board could tax "churchgoers, in order to induce the state to pass a law providing for that sort of thing." Arguments in the Cases Arising Under the Social Security Act, etc., S.Doc.No.53, 75th Cong., 1st Sess. 105 (1937). See also *id.* 108, 116.

It is our submission that the FUTA amendments challenged here apply the FUTA credit to violate the Tenth Amendment in the fashion Mr. Jackson (and the *Steward* Court) would not have tolerated with respect to the First Amendment. Therefore, this case presents the question left open in *Steward,* namely, the appropriateness of using the federal taxing power to effect a policy that is expressly forbidden the federal government by the Constitution.[60]

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[60]Even in its broadest compass, the issue of the permissible range of evasion of *National League* presented in this case, does not necessarily implicate the federal spending power, endorsed without opinion by this Court in *North Carolina* v. *Califano,* 435 U.S. 962 (1978).

The Labor Department indicated clearly to the Senate Finance Committee that the FUTA amendments could not be defended as a conditional grant program. The amount of federal grants attributable to the increased costs to the states of administering the claims of (rather than paying benefits to) public workers is $8 million annually. Unemployment Compensation Amendments of 1976: Hearings on H.R. 10210 Before the Senate Comm. on Finance, 94th Cong., 2d Sess. 34-36 (1976). It is a strange grant program whose condition (at least $385 million) so exceeds its benefits.

Moreover, a nonconforming state is unable to decline the grant without penalty. Before the FUTA public-sector amendments, all states received grants for administration of the private-sector program. Any state decertified for failure of the public-sector program would lose not only its aliquot share of the $8 million additional grant, but the longstanding private-sector grant of some $900 million per year as well.

(footnote continued)

III

CONGRESS INTENDS TO ENACT ADDITIONAL LEGISLATION UNDER THE HOSTAGE ENFORCEMENT MECHANISM THE CONSTITUTIONALITY OF WHICH IS CHALLENGED HERE

We view the change from the private sector unemployment program to the public worker benefit program as a qualitative change. Not only does the change bring under federal control the group of public employers which, after *National League,* Congress is forbidden to regulate directly. The threat of federal tax sanctions to secure performance by a tax-exempt entity can be applied both within and beyond the area of intergovernmental relations, personnel regulation and tax immunity.

The hostage-taking method of the FUTA amendments, as a means of circumventing the rule in *National League,* is currently under consideration by Congress in yet another attempt to extend federal controls validly imposed on private-sector employers to states and their political subdivisions as employers. See H.R. 6525, Title I, the Public Employee Retirement Income Security Act of 1980 (introduced February 13, 1980) (putative immunity of public-sector pension plans from federal standards retained, but federal tax deferral denied to public workers whose public employers' plans do not conform). See also, Pension Task Force Report on Public Employee Retirement Systems, House Comm. on Educ. and Labor, 95th Cong., 2d Sess. 20 (Comm. print 1978) ("Such a methodology would obviously generate tremendous pressure by plan participants on public plans to comply with whatever

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Finally, the predictable exodus of private employers from a nonconforming state (to avoid payment of the full 3.4% FUTA tax) would leave a nonconforming state's economy and tax base worse off than before the public-sector FUTA requirement was enacted.

federal conditions must be met to gain favorable tax treatment for the participants.").

A similar method is proposed to require state and local government participation in the Social Security (FICA tax) system ("Congress simply could require state and local employees to pay both employer and employee contributions . . . [if their government employers] do not choose to join the Social Security program.") Report of the Universal Social Security Coverage Study Group to the House Comm's on Ways and Means, and Post Office and Civil Service 247 (Comm. print 1980).

It is not fanciful to suggest other possible hostage schemes.

The federal gasoline excise tax is 4 cents per gallon and state and local governments are exempt.[61] The federal government could declare the tax to be 20 cents (on the private sector) with a 16-cents credit in states which tax state and local government gasoline purchases. This state tax on its governments would have to be earmarked for the 10% (or greater) state share of state-federal highway projects (the federal tax already is earmarked for the federal share[62]). Similar uses could be made, against police departments, e.g., of the federal fuel tax[63] or, the federal truck, tire, oil or firearms excises.[64]

It is our submission that these schemes would be indistinguishable in the constitutional sense from the FUTA

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[61]IRC § 4081.

[62]23 U.S.C. § 120 note.

[63]IRC § 4041. The government exemption is IRC § 4041(g)(2).

[64]IRC §§ 4071, 4091, 4181. The government exemption is IRC § 4221. *Cf., Massachusetts v. United States,* 435 U.S. 444 (1978) (user fee levied on state operations directly is valid).

amendments for which we seek review. These schemes present a similar capacity to vitiate the protections endorsed by this Court in *National League, supra.* The only difference is that the 2 billion-dollar cost of compliance involved in this case probably exceeds the cost of these proposed "hostage" schemes.

CONCLUSION

By the very nature of coercion of state compliance, this case will settle the constitutional limits on the federal regulation of the law of state-local governmental employment whether or not review is granted. We urge this Court to settle the law by the application of reason and empirical analysis, not by the blind citation to the work of the dead hand of the past rendering public employees the same as the private employees in *Steward* contrary to the principles of *National League* and the decisions cited therein. We urge that a writ of certiorari be granted in this case to decide the novel question herein presented of the constitutionality of a new way to force or coerce the states to give up their sovereign immunity or have their industrial tax base destroyed.

We urge that probable jurisdiction be noted or postponed in No. 79-1846, *State of New Hampshire* v. *Marshall,* and that that case and this case be set for separate but coterminous briefing,[65] and that argument in both cases be calendared in tandem.

Respectfully submitted,

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[65]IRC § 3310(e) requires expedition in *New Hampshire.* We urge that briefing on the merits be ordered completed on an expedited schedule as clearly this is a matter of great public importance when it involves all governments and their tax-produced budgets.

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Counsel for the remainder of the some 1750 petitioners are listed on the caption to the complaint lodged with the Clerk of this Court.

June 1980

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2138

THE COUNTY OF LOS ANGELES, CALIFORNIA, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA, ET AL., APPELLANTS

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES, ET AL.

No. 78-1142

THE COUNTY OF LOS ANGELES, CALIFORNIA, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA, ET AL.

LOUISIANA MUNICIPAL ASSOCIATION, ET AL., APPELLANTS

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES, ET AL.

No. 78-1232

THE COUNTY OF LOS ANGELES, CALIFORNIA,
A POLITICAL SUBDIVISION OF THE
STATE OF CALIFORNIA

THE STATE OF SOUTH CAROLINA

THE STATE OF ALASKA, ET AL., APPELLANTS

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY
OF LABOR OF THE UNITED STATES, ET AL.

No. 78-1275

THE COUNTY OF LOS ANGELES, CALIFORNIA,
A POLITICAL SUBDIVISION OF THE
STATE OF CALIFORNIA, ET AL.

LOUISIANA MUNICIPAL ASSOCIATION, ET AL., APPELLANTS

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY
OF LABOR OF THE UNITED STATES, ET AL.

No. 78-1311

THE COUNTY OF LOS ANGELES, CALIFORNIA,
A POLITICAL SUBDIVISION OF THE
STATE OF CALIFORNIA

THE STATE OF SOUTH CAROLINA

THE STATE OF ALASKA, ET AL.

THE STATE OF UTAH, APPELLANT

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY
OF LABOR OF THE UNITED STATES, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. 77-2023)

Argued February 14, 1979

Decided March 19, 1980

William S. Rhyne, with *Charles S. Rhyne*, *Martin W. Matzen*, and *David V. Anthony*, were on the brief, for appellants, County of Los Angeles, et al.

Calvin L. Rampton, a member of the bar of the Supreme Court of Utah, was allowed to argue (pro hac vice), for appellants, County of Los Angeles, et al.

Robert T. Duffy, Attorney, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, *Gilbert E. Andrews*, and *Leonard J. Henzke, Jr.*, Attorneys, Department of Justice, were on the brief for appellee, Department of Justice.

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, *E. J. Setlock*, Assistant Attorney General, Attorneys for the State of Michigan, *George Kaufman*, *A. L. Zwerdling*, *Janet Kohn*, Attorneys, for A.F.S.C.M.E., *J. Albert Wall*, General Counsel, AFL-CIO, *Laurence Gold*, Special Counsel, AFL-CIO, *Edward J. Hickey*, General Counsel, Public Employee Department, AFL-CIO, were on the brief, for the State of Michigan, A.F.S.C.M.E., and AFL-CIO.

Donald A. Carr, *Peter Archie*, *Michael Nemeroff*, *Frederick Simpich*, *Thomas Shannon*, *August W. Steinhilber*, and *John J. Gunther*, were on the brief, for Amici Curiae of the International City Management Association, National Association of Counties, National Association of Towns and Townships, National League of Cities, National School Boards Association, and the U.S. Conference of Mayors, in support of the position of appellant, County of Los Angeles, et al.

Frederick Simpich, Thomas Shannon, and *August W. Steinhilber,* were on the brief for International Personnel Management Association and National School Boards Association as Amicus Curiae.

Before MCGOWAN, LEVENTHAL* and ROBB, *Circuit Judges.*

Opinion *Per Curiam.*

PER CURIAM: In these consolidated appeals a number of states and political subdivisions have challenged, on constitutional grounds, the failure of the District Court to afford them the injunctive and declaratory relief sought by them with respect to the 1976 amendments to the Federal Unemployment Tax Act (FUTA). These amendments extended the reach of that Act to the employees of state and local governments. Pub. L. No. 94-566, 90 Stat. 2667 (1976).

The constitutional objections asserted by appellants derive from the Tenth Amendment, and their reliance is upon *National League of Cities v. Usery,* 426 U.S. 833 (1976). In that case the Supreme Court invalidated, as in contravention of the Tenth Amendment, the extension by the Congress of the Fair Labor Standards Act to the employees of state and local governments.

The first line of defense interposed by the federal appellees was that the strictures of the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), and the tax exception provisions of the Declaratory Judgment Act, 28 U.S.C. 2201-2202, operated to foreclose the relief sought. The District Court so held, and did not reach the constitutional claim. On appeal, this holding was attacked as erroneous, and the constitutional challenge was renewed.

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* Circuit Judge Leventhal was a member of the panel which considered this case but died before the opinion was issued.

As early as the oral argument before us, it appeared that this same challenge had been made by the State of New Hampshire Department of Employment Security in an administrative proceeding involving the decertification by the Secretary of Labor of New Hampshire's conformity to FUTA as amended, and that it was being pressed in a review of that proceeding pending before the United States Court of Appeals for the First Circuit. 26 U.S.C. § 3310. In the interest of inter-circuit comity and the concomitant husbanding of scarce judicial resources, this court concluded to await the disposition to be made of the constitutional claim by the First Circuit—a disposition which did not implicate the substantial preliminary questions confronted by this court by reason of the Anti-Injunction and Declaratory Judgment Acts.

The First Circuit's decision was delayed by the representations of the parties that settlement negotiations were proceeding. Those negotiations having at length proved abortive, the First Circuit has now decided the case. *State of New Hampshire Department of Employment Security v. Marshall* (No. 78-1564, decided February 20, 1980, slip opinion). In addition to sustaining the Secretary's decertification of New Hampshire as not conforming in certain respects with FUTA, the First Circuit addressed the Tenth Amendment contention and concluded that it was unavailing. We agree with the constitutional determination so made by the First Circuit, and adopt its reasoning as fully applicable to the consolidated appeals before us.[1]

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[1] There were six particulars in which the Secretary found New Hampshire to be non-conforming, only two of which related to state and local employees. Because the court sustained the Secretary as to all of them, Judge Campbell did not think it necessary to reach the constitutional issue. The majority, however, pointed out that, in the administrative proceeding, New Hampshire introduced virtually no evidence on conformity but rather focused on its constitutional

That reasoning—correctly, we think—rests upon the proposition that *Usery*, involving a mandatory imposition on state and local governments bottomed upon the commerce clause, is wholly distinguishable, and diminishes in no way the authority of *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)—the case which upheld the scheme of federal-state cooperation founded upon the spending power and embodied in FUTA as it was originally enacted. The voluntary and wholly optional aspect of that scheme persists in full measure under the 1976 amendments, and serves to defeat the contentions advanced by appellants of coercion and improper transgression upon the sovereignty of the states shielded by the Tenth Amendment.

In following the course we have, we think it relevant to note that counsel for appellants in this case participated in the First Circuit review proceeding as counsel for petitioners, and also for the *amici curiae*, one of which was the County of Los Angeles, a principal appellant before us. Of that *amicus*, the First Circuit said that "it has had an opportunity to present its constitutional arguments exhaustively from every conceivable angle."

The judgment of the District Court dismissing the complaint is affirmed.

It is so ordered.

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claim. Indeed, it advised the First Circuit in brief that it was not in conformity "because of its refusal to amend its law to accommodate the unconstitutional public sector program financing requirements." As to the four non-conformity findings limited to the private sector, New Hampshire asserted to the court that it recognized the necessity for it to conform but it understood that the Secretary had waived these requirements pending resolution of the constitutional issue. The court found no such waiver, but since the constitutional claim involving the public employees seemed to the majority to be at the heart of a controversy which sorely needed to be laid to rest, it thought it best to decide it.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D.C. 20001

March 19, 1980

RE: Appeal No. 77-2138 et al. – The County of Los Angeles, California, etc. v. The Honorable F. Ray Marshall, Secretary of Labor of the United States, et al.

Dear Sir:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Very truly yours,

Donna L. Raeder
Opinions Clerk

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 78-1564

STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

PETITIONERS,

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES, AND THE UNITED STATES DEPARTMENT OF LABOR,

RESPONDENTS.

ON PETITION FOR REVIEW OF THE DECISION OF THE SECRETARY OF LABOR OF THE UNITED STATES

Before

CAMPBELL and BOWNES, *Circuit Judges*,
DEVINE, *District Judge*.*

Charles S. Rhyne and *James E. Morris*, with whom *Edward F. Smith*, General Counsel, *Paul V. Kenneally*, *William S. Rhyne*, *Martin W. Matzen*, *Stephen P. Elmendorf*, and *Rhyne & Rhyne*, were on brief, for petitioners.

Robert T. Duffy, Attorney, Tax Division, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, *Gilbert E. Andrews* and *Leonard J. Henzke, Jr.*, Attorneys, Tax Division, Department of Justice, were on brief, for respondents.

George Kaufmann, with whom *Zwerdling and Maurer*, *A.L. Zwerdling*, *Janet Kohn*, *Leonard Lesser*, *J. Albert Woll*, General Counsel, AFL-CIO, *Laurence Gold*, Special Counsel, AFL-CIO, and *Edward J. Hickey*, General Counsel, Public Employee Dept., AFL-CIO, were on brief, for American Federation of Labor, et al., amici curiae.

Richard M. Flynn, *Charles S. Rhyne*, *William S. Rhyne*, *Martin W. Matzen*, *Stephen P. Elmendorf*, and *Rhyne and Rhyne*, on brief for Business and Industry Association of New Hampshire, et al., amici curiae.

*Of the District of New Hampshire, sitting by designation.

February 20, 1980

BOWNES, *Circuit Judge*. This is an appeal pursuant to 26 U.S.C. § 3310[1] of the decision of the Secretary of Labor that the New Hampshire Unemployment Compensation law fails to conform in six separate respects with the requirements of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311.

In order to understand the issues involved, some explanation of the unemployment compensation law is necessary. The law has its roots in the Great Depression when unemployment was so widespread that the separate states were unable to meet the basic needs of their citizens. Several states, of which Wisconsin was the leader and New Hampshire an early follower, enacted their own unemployment insurance programs. The financing for these programs was obtained mainly by a tax on private employers. Many states, however, refused to enact such programs fearing that the tax on local employers would cause them to flee to other states which did not have such a law. The federal unemployment insurance law was thus devised to meet a national problem. The constraints of federalism and the dictates of practical politics resulted in legislation designed to equalize the burden on the states with full participation by all. This was accomplished by the inducement of tax credits to private employers and outright grants made available to the states to help defray the administrative costs of the program. The tax on the private employer was levied and collected by the state. The moneys collected had to be promptly remitted by the states to the Secretary of the Treasury. A credit of up to 90% of the tax due was given the employer if he had made

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[1]We understand that this is the first appeal under 26 U.S.C. § 3310, which provides in pertinent part:

> (a) *In general.* — Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located of with the United States Court of Appeals for the District of Columbia, a petition for review of such action.

contributions to his state's unemployment insurance fund. The tax credit and the grants were contingent on certification by the Secretary of Labor that the state had enacted an unemployment compensation program that conformed to federal statutory requirements.

There was no direct statutory command to the states requiring them to conform to federal law. The federal government made an offer to the states which they could accept or refuse. Up until now, all the states found the combination of tax credits to its private employers and outright grants in return for conforming legislation an offer that could not be refused.[2]

Although the Act has been extensively amended since its inception in 1935, the basic design and statutory machinery have remained constant. The present statutory machinery works as follows. Under 26 U.S.C. §§ 3301 and 3306(b)(1), private employers are taxed an amount equal to 3.4 percent of the first $6,000 in wages paid each employee. 26 U.S.C. § 3302(a)(1) allows a credit of up to 2.7 percent of such wages against the tax for the employer's contribution to an unemployment fund maintained under state law. But the employer can obtain this credit only if the state's unemployment law is certified by the Secretary of Labor as provided in 26 U.S.C. § 3304.

26 U.S.C. § 3304(a) requires that the Secretary of Labor approve any state unemployment compensation law that conforms to the federal requirements. Section 3304(b) requires the Secretary to notify the governor of the state of such approval, and section 3304(c) requires the Secretary to certify such approval to the Secretary of the Treasury. Failure to obtain certification means not only the loss of FUTA tax credits for private employers, but also the loss to noncertified states of two kinds of federal grants. One grant goes towards the cost of

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[2]For a full discussion of the genesis of the unemployment insurance program and its statutory mechanism, see *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937), and *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937).

administering the state's unemployment compensation program. 42 U.S.C. §§ 501-503. The other goes towards the administration of public employment offices which provide for job-finding, employment recruiting and other services. 29 U.S.C. §§ 49-49n.

Coverage under the unemployment compensation law was modified, restricted and expanded in 1976 by amendments to FUTA. The changes that concern us are as follows.

1. Employees of a state and its political subdivisions were required to be covered. 26 U.S.C. § 3304(a)(6)(A), 26 U.S.C. § 3309(a)(1)(B), and 26 U.S.C. § 3306(c)(7).

2. Coverage was extended to the employees of nonprofit schools which are not institutions of higher learning. 26 U.S.C. § 3304(a)(6)(A), 26 U.S.C. § 3309(a)(1)(A), and 26 U.S.C. § 3306(c)(8).

3. Political subdivisions of a state were given the option of reimbursing the state for unemployment benefits paid to former employees in lieu of making payments in the same manner as private sector employees. 26 U.S.C. § 3304(a)(6)(B) and 26 U.S.C. § 3309(a)(2).

4. 26 U.S.C. § 3304(a)(14)(A), (B) and (C) restricted the coverage of aliens, requried uniform reporting of alien status data and imposed the preponderance of the evidence test for denying compensation based on alien status. Under 26 U.S.C. § 3304(a)(9)(A), denial of compensation to an alien from a country contiguous to the state of employment solely on the basis that he filed another claim in that country was forbidden.

5. Coverage afforded to professional athletes was restricted by prohibiting the payments of benefits between athletic seasons. 26 U.S.C. § 3304(a)(13).

6. The coverage of employees of educational institutions was modified in regard to the coverage of professional and non-professional employees between academic terms or years, and during vacation periods and vacation recesses. 26 U.S.C. § 3304(a)(6)(A)

This case was precipitated by the veto on June 23, 1978, by the then governor of New Hampshire, of a bill that was intended to bring the New Hampshire Unemployment Compensation law into conformity with the provisions of 26 U.S.C. § 3304. The state had amended its unemployment compensation law, effective January 1, 1978, in an effort to conform with the 1976 amendments. It was notified by the Secretary of Labor in February of 1978 that he had serious questions as to whether this law conformed with federal requirements. This led to the June, 1978, legislation, the veto of which was accepted by the legislature.

After the veto of the conformity legislation, a hearing pursuant to 26 U.S.C. § 3304(c), was scheduled by the Department of Labor on whether New Hampshire was in conformity in regard to the five categories of coverage and the optional payment provision for political subdivisions of the state. The hearing was held on September 14 and 15, 1978. In addition to the six conformity issues, New Hampshire challenged the constitutionality of the 1976 amendments as they related to coverage of the employees of a state and its political subdivision. Indeed, almost all of the evidence introduced by New Hampshire focused on the constitutional issue. The administrative law judge (ALJ) found that New Hampshire's unemployment law failed to conform with federal law in all six respects claimed by the Secretary. He made findings of fact as to the constitutional issue, but made no ruling thereon. In reviewing the opinion of the ALJ, the Secretary made additional findings, modified a conclusion of law, corrected some errors and then adopted the findings of facts and conclusions of law of the ALJ as his own.*

*On June 23, 1979, New Hampshire enacted House Bill 808 in an attempt to conform with the 1976 FUTA amendments. We asked for briefs on the question of whether this legislation rendered the case moot. The State of New Hampshire, in a brief by its Attorney General, urged that the case was moot. The other parties, the Department of Labor, the State of New Hampshire Department of Employment Security, and the Amicus took the position that the case was not moot.

The parties differ on the scope of our review. Petitioners focus on the constitutionality of the 1976 amendments while respondents assert that, if we uphold the findings of statutory violations, we need not and should not reach the constitutional issue. While the course suggested by respondents is tempting, we feel that we must decide both the conformity and constitutional issues.

The state did not meet the conformity requirements of 26 U.S.C. § 3304, nor does it so claim. As already noted, it introduced practically no evidence at the hearing on conformity and did not urge that it had complied with the law. New Hampshire's brief is devoted almost exclusively to the constitutional question. In fact, it admits nonconformity by stating, "New Hampshire has failed to satisfy the Secretary as to the requirements of the 1976 amendments, solely because of its

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Our examination of the bill and subsequent events convince us that the case is not moot. House Bill 808 did provide a framework for bringing New Hampshire into conformity with FUTA. The legislation alone, however, could not bring New Hampshire into full compliance. Conforming rules and regulations had to be promulgated by the New Hampshire Department of Employment Security to flesh out the bare bones legislation. These required the approval of the Secretary of Labor. In addition, administrative action by New Hampshire was necessary to give such rules and regulations retroactive effect. The parties attempted for months to agree on the rules and regulations and administrative action for implementing House Bill 808 and bringing New Hampshire into conformity with the FUTA amendments. The State of New Hampshire and the Department of Labor did agree on conforming rules and regulations and a judgment was prepared embodying them. The New Hampshire Department of Employment Security, however, refused to approve the judgment agreed upon by the Department of Labor and the State. Since the judgment had to be implemented by the New Hampshire Department of Employment Security and since this department is completely autonomous, there can be no settlement without its approval.

It must also be noted that House Bill 808's statement of purpose expresses clearly and forcibly the opinion of the New Hampshire Legislature that it had no other alternative but to accede to this "federal intrusion of its sovereignty" and that the legislation was enacted "under duress and for no other reason."

refusal to amend its law to accommodate the unconstitutional public sector program financing requirements." Brief at 66. This admission is repeated in its supplemental brief at 11.

This is clearly not the type of case where statutory interpretation makes it unnecessary to meet the constitutional issues. New Hampshire made it clear before the ALJ at the hearing, and before us, that it was refusing to conform because it felt that the statute itself was unconstitutional. New Hampshire's decision to put all its eggs in the constitutional basket, however, does not mean that we can avoid our statutory duty of review of the Secretary's order. *See New York City Transit Authority* v. *Beazer*. 440 U.S. 568 (1979). We must determine whether there is substantial evidence on the record to support the Secretary's findings.[3]

The evidence presented at the hearing can be summarized as follows. New Hampshire was advised during the period October 21, 1976, through June 24, 1978, by the Department of Labor what amendments would be necessary to bring its unemployment compensation law into conformity with 26 U.S.C. § 3304. The Department of Labor specifically informed the state that its law was deficient in the six categories already outlined.

The evidence was uncontradicted that, although New Hampshire has provided full unemployment insurance coverage for its permanent and classified civil service employees, temporary and seasonal workers and those not classified are not covered. N.H. Rev. Stat. Ann. § 282:1-H(4)(g) and (q) specifically exclude from coverage employees of political subdivisions and nonclassified state workers. The finding of the Secretary that New Hampshire did not meet the requirements of federal law as to coverage of employees of the state and its political subdivisions was clearly correct. This finding is also the basis for the Secretary's deter-

[3]26 U.S.C. § 3310(b) provides in pertinent part:

> (b) *Findings of fact.*—The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive[.]

mination that the option provisions of the federal statute were not met because, under New Hampshire law, N.H. Rev. Stat. Ann. § 282:6-A-2, payments into the unemployment compensation fund by political subdivisions of the state were limited to those who had elected coverage.

N.H. Rev. Stat. Ann. § 282:1-H(4)(s)(3) specifically excludes from coverage those "in the employ of a school which is not an institution of higher education." This is directly contrary to the 1976 FUTA amendment which requires the states to cover employees of nonprofit schools below the level of institutions of higher education.

Under subsections (B) and (C) of 26 U.S.C. § 3304(a)(14), information as to alien status must be uniformly required from all compensation applicants, and a state agency can only deny compensation because of alien status on a preponderance of the evidence. New Hampshire law does not have any alien status conforming provisions. Under N.H. Rev. Stat. Ann. § 282:1-N(1)(a), it is specified that wages shall not include the amount of any payment to an alien unless he was in the United States under color of law. The Secretary found this provision was ambiguous and might conflict with federal law relative to aliens from a country contiguous to that of the state in which he is employed. We agree.

The Secretary properly found that, under New Hampshire law, N.H. Rev. Stat. Ann. § 282:1-0, payments to athletes between seasons were not prohibited as required by federal law, but only reduced by eliminating the sports income from the athlete's base period earnings.

The Secretary's findings as to employees of educational institutions are based on a restricted and technical reading of the federal statutory provisions. If this were the only issue, we might be persuaded to find that New Hampshire was in substantial compliance, but the broad provisions of the New Hampshire statute, N.H. Rev. Stat. Ann. § 282:3-F, leave too much to interpretation and construction to satisfy the tight federal requirements.

We uphold the decision of the administrative law judge, as modified and adopted by the Secretary, that New Hampshire's Unemployment Compensation law was in the six respects specified not in conformity with the requirements of the implicated 1976 amendements to FUTA.

The constitutional issue can be stated thusly: do the 1976 amendments to FUTA violate the sovereign integrity of the states and impair their ability to function effectively under the federal system as guaranteed by the tenth amendment.

The basic question is whether this case falls within the new furrow ploughed by *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), or follows in the wake of *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). In *Usery*, the Supreme Court, in a five to four decision, overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968),[4] and held that the 1974 amendments of the Fair Labor Standards Act (FLSA) extending its provisions to employees of the states and their political subdivisions were unconstitutional and prohibited by the tenth amendment. Petitioners urge that its holding and rationale also doom the 1976 FUTA amendments which apply to the same employee groups.

We note first that only two of the six nonconformity findings implicate the tenth amendment, the one pertaining to coverage of employees of the state and its political subdivisions[5] and the option given these entities relative to the method of payment.[6]

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[4]"While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are, therefore, persuaded that *Wirtz* must be overruled." *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976).

[5]The other four nonconformity findings are limited to the private sector. New Hampshire, in its latest brief, acknowledges its duty to conform to the 1976 amendments as they apply to the private sector, but argues that respondent Secretary waived these requirements pending resolution of the constitutional issue. The Secretary denied any waiver and argues that New Hampshire is precluded from asserting a waiver since it was not raised below. We find no evidence of a waiver by the Secretary.

Our analysis begins with the obvious; that we are dealing with a different federal statute and, more importantly, a different regulatory method than was at issue in *Usery*. The minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA) invalidated in *Usery* were imposed on the states by command. The authority for such command rested on the commerce clause. On the other hand, the 1976 FUTA amendments, following the design of the original Act, were not based on the commerce clause and were not directly imposed on the states which had the option of conforming or not.

There is no doubt that *Usery* focused on the command of the FLSA amendments that the states must adopt the maximum hours and minimum wage provisions for its own employees.

> The Act, speaking directly to the states *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress.

National League of Cities v. *Usery*, *supra*, 426 U.S. at 847-48.

> But, like the minimum wage provisions, the vice of the Act as sought to be applied here is that it directly penalizes the states for choosing to hire governmental employees on terms different from those which Congress has sought to impose.

Id. at 849.

This command to the state is given bite by 29 U.S.C. § 216, which provides for both civil and criminal penalties in the event of a violation.

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[6]For purposes of this discussion, we include public school employees as employees of political subdivisions of the state. We are aware, of course, that in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), the Supreme Court held that a local school board was not an arm of the state and, therefore, not entitled to invoke the bar of the eleventh amendment. *Id.* at 280-81. We do not think, however, that this limitation applies to the tenth amendment.

In contrast, the basic premise and statutory scheme of the federal-state unemployment compensation program, which have remained unchanged since 1935, are based on the concept that a state is free to accept federal conditions by conforming to federal statutory requirements or can refuse to participate entirely. Unlike the legislation at issue in *Usery* and *Maryland* v. *Wirtz*, *supra*, the commerce clause is not implicated. Congress chose to advance this legislation through its spending power. In *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. 548 (1937), the validity of the tax on employers was upheld against constitutional attack. Mr. Justice Cardozo, writing for the majority, outlined the history and purpose of this historic legislation and held that "[t]he excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Id.* at 585. An attack on a state's (Alabama) conforming legislation on the ground that its enactment was coerced by the federal government was rebuffed in *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937).

Petitioners argue, however, that this option of the state to refuse to participate in the program is illusory, since the severe financial consequences that would follow such refusal negate any real choice. Petitioners assert that, while the 1976 federal statutory requirements are not imposed by fiat, as with the 1974 amendments to the FLSA, the coercive effect is the same. This is particularly so, they contend, because most of the financial burden for a state's decision not to conform falls on its private employers through loss of federal tax credits. All parties agree that the cost to the private employers in New Hampshire will be about forty million dollars in 1978 tax credits. It is argued that by holding the private employers "ransom," Congress coerces compliance.

We do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game.[7] The basic

[7]New Hampshire is the only state that has opted not to conform. It

design and mechanism of the Act have not changed since 1935. Its coverage has been extended,[8] but the percentage of tax credits remains essentially the same.[9] The primary reason, of course, for the increase in the dollar amount of tax credits has been the expansion of our economy since 1935. The increase in the number of employers and employees and the amount paid in wages has meant a corresponding increase in the dollar amount of tax credits.

We must also recognize that, since 1935, the philosophy and objective of the unemployment compensation program, *viz.*, that unemployment is a national problem that must be dealt with on a national basis, have been woven into the fabric of our society.[10]

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repeatedly stresses in its brief the burden on the state's employers if the Act is held constitutional. We observe that it is easy to gamble for high stakes when the money on the table comes from someone else's pocket.

[8]The categories of employees has expanded. Single employees are now covered. Federal civilian employees were included in 1954 with provisions to reimburse the states for the benefits paid and the administrative costs. In 1966, federal military personnel were covered. In 1970, conformity requirements were passed to extend coverage to employees of large nonprofit organizations and employees of state hospitals and state institutions of higher learning. The 1976 amendments extended the tax to farms which employ ten or more workers for certain time periods or pay at least $20,000 in wages in any calendar quarter. 29 U.S.C. § 3306(a)(2). Under 26 U.S.C. § 3306(a)(3), employers of domestic workers were included.

[9]Originally, FUTA was based on the total wages of each employee. In 1940, the tax was limited to the first $3,000 of each employee's wages. At present, the tax base is the first $6,000 of wages. Unemployment Compensation Amendments of 1976. The tax rate has gone from 3.0 percent to its present rate of 3.4 percent; the tax credit has remained constant at 2.7 percent.

[10]In the Emergency Unemployment Compensation Act of 1974, Congress extended emergency benefits for individuals who had exhausted their regular benefits during a period of high unemployment. Although emergency benefits were funded entirely by the federal government, only certified states could participate in the program. The Emergency Jobs and Unemployment Assistance Act of 1974 provided unemployment benefits for individuals generally not covered under the regular program, *i.e.*, agricultural and domestic

In *Usery*, the Court specifically refrained from deciding whether the spending power could be unconstitutionally used to impair state sovereignty:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

National League of Cities v. *Usery*, 426 U.S. at 852 n.17.

We construe *Usery* to hold that congressional legislation based upon the commerce clause which impairs the sovereign functions of the states is unconstitutional. Two other circuits have refused to extend the *Usery* doctrine to legislation not squarely bottomed on the commerce clause. In *Usery* v. *Charlestown City School District*, 558 F.2d 1169 (4th Cir. 1977), and in *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977), the courts rejected arguments that, in light of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Equal Pay Act was

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workers and employees of state and local governments. This program was fully funded by the federal government, but was payable only in areas designated by the Secretary of Labor during periods of high unemployment. During fiscal 1976, the federal government paid about 3.4 billion dollars in emergency benefits. U.S. Dept. of Labor, Sixty-Fourth Annual Report 12-13 (1976). Federal grants to the states for the administration of their unemployment compensation program amounted to over $9,000,000 for fiscal 1977. 1 House Hearings before SubComm. of Comm. on Appropriations, 95th Cong. 2d Sess. 191 (1978). When state reserves are insufficient to meet the need for benefit payments, the federal government through the unemployment trust fund lends the needed funds to the state. Such loans are interest free. As of February 1, 1978, there were outstanding loans to twenty-one states in the aggregate amount of $4.9 billion. 1 House Hearings, *supra*, at 168-69. Federal appropriations of FUTA tax receipts to the unemployment trust fund amounted to over $1.5 billion in fiscal 1976, and almost $2 billion in fiscal 1977. The Budget of the U.S., Fiscal Year 1978, App. 508; The Budget of the U.S., Fiscal Year 1979, App. 621.

an unconstitutional exercise of congressional authority under the commerce clause. Both courts viewed the application of the Equal Pay Act to the states as a legitimate exercise of congressional authority to adopt legislation enforcing the fourteenth amendment's guaranty of equal protection of the law. Similarly, in *Arritt* v. *Grissell*, 567 F.2d 1267 (4th Cir. 1977), the court held that Congress enacted the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, under section 5 of the fourteenth amendment,[11] rejecting the contention that the ADEA was impermissibly grounded on the commerce clause.

The tax at issue here, FUTA, is not based on the power of Congress under the commerce clause. Congress has relied on the attraction of the federal purse to persuade the states that it is in their best interests to conform to a national unemployment insurance program. Inducing state participation in national progams by the offer of federal funds is not limited to the unemployment compensation program. In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978), the issue of the constitutionality of a conformity addition to the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300k *et seq.* was raised. In upholding the constitutionality of the Act, the court specificaly stated:

> It must be remembered that this Act is not compulsory on the State. Unlike the legislation faulted in *State of Maryland* v. *Environmental Protection Ag.*, *supra*, 530 F.2d 215, it does not impose a mandatory requirement to enact legislation on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not "coercive" in the constitutional sense (emphasis in original).

[11] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Id. at 535-36.

Under the Medicaid Act, Title XIX of the Social Security Act of 1965, participating states are enabled by the use of federal funds to provide medical services for welfare recipients. A state's participation in Medicaid is voluntary but, if it chooses to participate, its plan must conform to the requirements imposed by the Medicaid Act. *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121, 124 (1st Cir.), *cert. denied*, 47 U.S.L.W. 3745 (May 15, 1979).

Since it can be argued that *Usery* was based on two separate and distinct concepts, the tenth amendment supremacy over the commerce clause *and/or* the impairment of state sovereignty, we next consider the evidence presented at the Labor Department hearing on impairment of New Hampshire's sovereignty due to the cost of extending unemployment benefits to uncovered state employees and employees of its political subdivisions. The finance officer of the City of Manchester (New Hampshire's largest city) testified that over the past nine years no permanent employees had been laid off, but the cost of covering the City's temporary seasonal employees would require costly new staffing and record-keeping practices which would affect the ability of the City to maintain existing programs. The testimony of Elizabeth Puddington, a consultant to the New Hampshire School Boards Association, was that, because of New Hampshire's dependence on the property tax and the difficulties inherent in increasing revenues therefrom, the cost of extending unemployment benefits to public schools would probably result in a curtailment of educational programs.

The sale of liquor through state licensed stores is one of the main sources of state revenue. The Director of Merchandising and Accounts of the New Hampshire State Liquor Commission estimated that the cost of extending unemployment benefits to Commission employees would be $75,000-$80,000 annually with a potential cost of $120,000 annually. The Comptroller of the State testified that the annual cost under

the reimbursement method of financing unemployment benefits could amount to as much as $4.3 million and that, under the alternate contributing tax method, the cost would be about $300,000.

The cost to the New Hampshire Department of Employment Security for administering the additional coverage would be between $75,000 and $150,000 annually, according to the affidavit of its deputy commissioner. There was also affidavit testimony as to the additional cost to the Department of Health and Welfare - $30,528 and $4,830 for the Fish and Game Department.

The overall cost to New Hampshire and its political subdivisions for unemployment coverage was the subject of expert testimony at the hearing. Lennox L. Moak was the expert for the state. He testified that the additional cost to the state would be $200,000 and $900,000 for its political subdivisions, for a total of $1,100,000. Dr. James D. Van Erden testified as an expert for the Labor Department. He estimated that the total cost to New Hampshire and its political subdivisions for fiscal 1978 would amount to $227,585, for fiscal 1979, $288,935, and for fiscal 1980, $330,787.[12]

Unlike the effect of the wage and hour standards in *Usery*, we do not think that this evidence establishes that extending coverage to the employees of New Hampshire and its political subdivisions will "significantly alter or displace" the ability of New Hampshire "to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." *National League of Cities* v. *Usery*, 426 U.S. at 851. FUTA does not set the wage rates or affect hours worked. All it does is insure unemployment benefits for state employees. Its administration is entirely within the control of the state. *See Pearce* v.

[12]In reviewing the findings of the ALJ, the Secretary made the following conclusion of law, which we find to be correct. "Due to New Hampshire's base period and benefit year, all of the cost for FY 1978 and approximately one-half the cost for FY 1979 of extending coverage to state and local government employees could have been, at New Hampshire's option, covered by the Federal Government under the transition provision (Section 121) of the 1976 Amendments."

Wichita County, 590 F.2d 128 (5th Cir. 1979), and *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978), in which the Equal Pay Act was upheld as constitutional under the commerce clause on the grounds that, unlike the minimum wage provisions condemned in *Usery*, the provisions of the Equal Pay Act did not impermissibly interfere with the states' employment scheme.

We hold that the 1976 amendments to FUTA relative to employees of a state or its political subdivisions do not impair the sovereignty of New Hampshire and have not been rendered unconstitutional by *Usery*.

There is one more matter that requires our attention, the request of Amicus Los Angeles County to reconsider our order dismissing it as a named petitioner in the case. Our order is reaffirmed for lack of jurisdiction under 26 U.S.C. § 3310(a).[13] We must also note that Amicus is represented by the same attorneys representing the State of New Hampshire Department of Employment Security. By use of the Amicus format, the petitioner has had an opportunity to present its constitutional arguments exhaustively from every conceivable angle.

CAMPBELL, *Circuit Judge* (Concurring). Like my colleagues, I find substantial evidence to support the decision of the Secretary of Labor that New Hampshire's unemployment compensation law failed in six specific respects to conform to the 1976 federal amendments. *See* 26 U.S.C. § 3310(b). This being so, even if New Hampshire's constitutional challenge to

[13] 26 U.S.C. § 3310(a) provides in pertinent part:

> Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action.

the statutory provision requiring it to provide unemployment coverage to state and local employees were correct, the Secretary was nonetheless entitled to withhold funding. Given an adequate statutory ground upon which to uphold the Secretary's decision, I therefore believe it to be unnecessary and inappropriate to decide New Hampshire's constitutional challenge.

Under 26 U.S.C. § 3304(c), the Secretary is commanded by Congress to withhold certification from any state which the Secretary "finds has failed to amend its law so that it contains *each* of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 to be included therein." (Emphasis added.) As I read this law, if the state's enactment fails to conform to the federal requirements in even one material respect, the Secretary is required to withhold certification. New Hampshire concedes that its law has not been amended to conform to the federal requirements, and that the law is deficient in six different areas. The state's constitutional challenge, however, relates to only two of these areas, those involving coverage for public employees. Even were we to find this part of the federal act unconstitutional, as New Hampshire urges, we would nevertheless be constrained to affirm the decision of the Secretary insofar as it rests on the four provisions of the 1976 amendments that are undoubtedly constitutional.[1]

> As the Supreme Court has recently observed:
>
> " 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector*

[1]I think it is plain that *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), would foreclose any attempt by the state to argue that the federal act is unconstitutional in its application to private employers. Four of the requirements to which New Hampshire's statute was found not to conform concerned private employers only. See discussion in majority opinion at pp. 7-8.

> *Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105. Before deciding [a] constitutional question, it [is] incumbent on . . . courts to consider whether . . . statutory grounds might be dispositive."

New York Transit Authority v. *Beazer*, 440 U.S. 568, 582 (1979); *see also Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-69 (1947); *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Since the statutory ground in this case is entirely dispositive, I see no reason to follow the parties into collateral issues. If New Hampshire wished a ruling on its point of constitutional law, it should first have conformed its laws in all respects not implicating the constitutional issue.

I would add that apart from the reasons given above for avoiding constitutional adjudication, I take no particular exception to the court's decision.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1564.

STATE OF NEW HAMPSHIRE DEPARTMENT
OF EMPLOYMENT SECURITY, ET AL.,
Petitioners,

v.

THE HONORABLE F. RAY MARSHALL,
Secretary of Labor of the United States;
and the UNITED STATES DEPARTMENT OF LABOR,
Respondents.

DECREE

Entered February 20, 1980

This cause came on to be heard upon petition for review of the decision of the Secretary of Labor of the United States

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for review is denied, and

The order of this Court dismissing Los Angeles County as a named petitioner in this case is reaffirmed for lack of jurisdiction under 28 [sic] U.S.C. Sec. 3310(a).

By the Court:

[s] DANA H. GALLUP
Clerk

APPENDIX E

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

March 10, 1980

To West Publishing Company, Commerce Clearing House, National Center for Automated Information Retrieval, Lawyers Weekly, and All Counsel

Re: 78-1564 State of New Hampshire Department of Employment Security, et al. v. The Honorable F. Ray Marshall, Secretary of Labor of the United States, and The United States Department of Labor

Gentlemen:

Please make the following corrections in the above captioned opinion which was released on February 20, 1980.

On page 12, footnote 8, last line, the word "employees" should be changed to, "employers."

On page 13, footnote 10, eight lines from the top, the figure "$9,000,000" should be changed to "$900,000,000."

Very truly yours,

DANA H. GALLUP,
Clerk.

By: [s] Francis P. Sagliano
Chief Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNTY OF LOS ANGELES, CALIFORNIA THE STATE OF SOUTH CAROLINA, et al., Plaintiffs,	:	
LOUISIANA MUNICIPAL ASSOCIATION, CITY OF NEW ORLEANS, LOUISIANA, et al., Plaintiff-Intervenors,	:	
v.	:	C.A. No. 77-2023
HONORABLE F. RAY MARSHALL, Secretary, United States Department of Labor, et al., Defendants,	:	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES; AMERICAN FEDERATIONS OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, Defendant-Intervenors.	:	

ORDER

This case having come on for a status call on January 24, 1978, which hearing began on that date and was continued over to January 25, 1978, and the parties having appeared through their counsel, and from the statements and arguments of counsel, the pleadings, and the papers filed herein concerning the plaintiffs' motion for preliminary injunction which this Court denied on December 29, 1977, and the papers filed concerning the cross-

motions for summary judgment, and the entire record in this case, this Court concludes that there exists a sharp and substantial factual conflict between the parties concerning the actual impact of the challenged statutory amendments upon the plaintiffs and the other various states and political subdivisions. It further appears that counsel for the Governmental defendants did reiterate its argument presented to this Court in opposition to the plaintiffs' motion for a preliminary injunction to the effect that this Court lacked jurisdiction over this action, and it further appearing that this Court did deny plaintiffs' motion for a preliminary injunction on various grounds, including jurisdictional grounds, as is set forth in this Court's eleven page Memorandum Opinion and Order of December 29, 1977, denying the plaintiffs' motion for a preliminary injunction, and this Court being of the opinion that the parties hereto have offered no new arguments which would cause this Court to change or modify its Memorandum Opinion dated December 29, 1977, this Court is of the opinion that its conclusions of law embodied in that Opinion of December 29, 1977, are dispositive of the issue as to this Court's jurisdiction to hear this case as follows:

The Court, in its Memorandum Opinion, denied the motion for a preliminary injunction ruling that there was no substantial likelihood of plaintiffs' success on the legal merits of the plaintiffs' case because of the Supreme Court's ruling in *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937), and the inapplicability of *National League of Cities v. Usery,* 426 U.S. 883 (1976) (see Memorandum Opinion, pp. 6-9), and on the grounds that the statute here in question is clear and unambiguous on its face and as a matter of law is optional and not mandatory with respect to the states and therefore cannot, as a matter of law, constitute a violation of the Tenth Amendment to the Constitution; and it is therefore the opinion of the Court that,

indeed, *Steward Machine, supra,* is controlling and would require a dismissal on the merits as a matter of law.

However, it is not necessary to reach either the legal merits or the factual merits of this case, nor to resolve the very substantial factual questions raised by the pleadings and the discovery papers both filed and proposed, since the Court concludes that it is deprived of subject matter jurisdiction by the terms of the Anti-Injunction Act, Section 7421(a) of the Internal Revenue Code of 1954 (Memorandum Opinion, pp. 4 and 5), and the Declaratory Judgment Act, 28 U.S.C. § 2201.

Accordingly, in the interest of judicial economy, this Court is *sua sponte* dismissing the action at this time on the foregoing legal grounds and is hereby deferring and terminating any further discovery and trial proceedings on the aforesaid substantial issues of fact, which discovery and trial proceedings would, of course, be resumed upon the eventuality that this Court's order of dismissal is set aside in appropriate proceedings either by this Court or by a final order of an appellate court. Accordingly, it is, by the Court, this 7th day of March, 1978,

ORDERED, that, in accordance with the Memorandum Opinion issued on December 29, 1977, the instant action be, and the same hereby is, dismissed.

[s] Charles R. Richey
Charles R. Richey
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNTY OF LOS ANGELES, CALIFORNIA THE STATE OF SOUTH CAROLINA, et al., Plaintiffs,	:	
LOUISIANA MUNICIPAL ASSOCIATION, CITY OF NEW ORLEANS, LOUISIANA, et al., Plaintiff-Intervenors,	:	
v.	:	C.A. No. 77-2023
HONORABLE F. RAY MARSHALL, SECRETARY, UNITED STATES DEPARTMENT OF LABOR; HONORABLE W. MICHAEL BLUMENTHAL, SECRETARY, UNITED STATES DEPART- MENT OF TREASURY; HONORABLE JAMES KURTZ, COMMIS- SIONER OF INTERNAL REVENUE SERVICE OF THE UNITED STATES Defendants,	:	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES; AMERICAN FEDERATIONS OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, Defendant-Intervenors.	:	

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This case is before the Court on a motion of over 1200 plaintiffs (seven states and the rest, political subdivisions) and the plaintiff-intervenors, the Louisiana Municipal

Association and seventy-four Louisiana municipalities, for a preliminary injunction to enjoin the defendants from implementing the Unemployment Compensation Amendments of 1976. These Amendments would require the state and local governments to finance unemployment benefits for these governments' former employees. This litigation is of monumental significance because the allegations indicate that the denial of the injunction may result in the firing of 100,000 state and local government employees and possibly the curtailment of some vital government services, while the granting of the injunction may result in some 2 million state employees and hundreds of thousands of local government employees being unable to obtain unemployment compensation should they become unemployed.

For the reasons hereinafter stated, the Court will deny the motion for a preliminary injunction. Upon consideration of all the memoranda filed, the affidavits, and the lengthy hearing held on the motion, the Court, under Fed. R. Civ. P. 52(a) and 65(d), makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. Plaintiffs challenge the requirements of Pub. L. No. 91-373 and Pub. L. No. 94-566, as amended by Pub. L. No. 95-19 ("challenged Amendments") which require that plaintiffs, beginning January 1, 1978, assume the financing of unemployment benefits for their former employees. Plaintiffs assert that these statutes trespass upon the state's sovereignty in violation of the tenth amendment to the Constitution.

2. Plaintiffs remain, even under the challenged amendments, immune from the Federal unemployment payroll tax, 26 U.S.C. § 3301.

3. However, failure of state and local governments beginning January 1, 1978 to enact conforming legislation approved by the Defendant Secretary of Labor, 26 U.S.C. § 3304, results in the denial of a tax credit, 26 U.S.C. §§ 3301, 3302, against the Federal unemployment payroll tax — collected by the Defendant Commissioner of Internal Revenue — on private employers within a nonconforming state.

4. The state must, under the challenged amendments, forward funds to the defendant Secretary of the Treasury to be held in the Federal Unemployment Trust Fund.

5. Beginning January 1, 1978, plaintiffs may, if they enact conforming legislation, need to set aside tax payments or accrue reserves against reimbursements to finance unemployment compensation benefits for plaintiffs' former government employees; however, any liability for weeks of unemployment prior to July 1, 1978, will be reimbursed by the Federal government, 26 U.S.C. § 3304 note.

6. Plaintiff states and local governments often have reached limits set by state Constitutions and statutes on incurring new debts and raising new revenues through taxes. If states do enact conforming legislation, these limits *may* induce the states and local governments to raise the needed revenue by curtailing or eliminating government services and by firing government employees. To prevent this, plaintiffs seek this injunction.

7. The issuance of an injunction will injure public employees who may become eligible for unemployment compensation; they will be injured to the extent that state and local laws do not provide for them because the Special Unemployment Assistance program, 26 U.S.C. § 3304 note, by which the federal government has paid for the

unemployment compensation of these employees since 1975, will expire on December 31, 1977.

8. Several of the states – most prominently plaintiff State of New Hampshire – have not enacted conforming legislation. The other plaintiff states have enacted legislation which purports to conform to the Federal requirements.

9. The consequence – unless an injunction is granted – of a state's failure to enact conforming legislation, is (a) denial of a tax credit against the Federal unemployment payroll tax levied on private employer Federal taxpayers within these nonconforming states, 26 U.S.C. § 3301, 3302; (b) shifting of the expenses of administering the state unemployment compensation law to the state treasury; and (c) termination of the present federal reimbursement of one-half of extended benefits (benefits paid to claimants from the 27th through 39th week of employment [sic]).

II. CONCLUSIONS OF LAW

Prior to discussing the four factors to be considered in determining whether a preliminary injunction should be issued, the Court must first decide whether it even has jurisdiction over this litigation.

It appears to the Court at this point in the litigation that the Anti-Injunction Act may bar this action. The Act, 26 U.S.C. § 7421(a), reads in relevant part:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The Supreme Court has stated that the terms of this Act are to be given "almost literal effect." *Bob Jones University v. Simon,* 416 U.S. 725, 737 (1974). Thus far, only two exceptions to the Act have been recognized: (1) the Act does not apply if it is clear that under no circumstances could the Government prevail and equity jurisdiction otherwise exists, *see Enoch v. Williams Packing Co.,* 370 U.S. 1, 7 (1961); (2) the Act does not apply when there is no access to judicial review, *see Investment Annuity, Inc. v. Blumenthal,* ____ F. Supp. ____, 77-2 U.S.T.C. 88,441, 88,442 (Nov. 9, 1977).

In this suit, plaintiffs seek to restrain the defendants from assessing or collecting a tax from the private employers in the nonconforming states. The refusal of a state to enact the conforming legislation would result in the denial of a tax credit to private employers within that state against their federal unemployment tax. Therefore, the plaintiffs' suit to hold unconstitutional the amendments, and thereby prevent the denial of this tax credit, is in essence a suit to restrain the assessment of a tax. The fact that the claims made by the plaintiffs are of a "constitutional nature . . . is of no consequence under the Anti-Injunction Act." *Commissioner v. "Americans United" Inc.,* 416 U.S. 752, 759 (1974). Furthermore, the exceptions do not apply. First, the Court cannot conclude that under no circumstances could the Government prevail. The fact that equitable jurisdiction may exist, i.e., that the plaintiffs may suffer irreparable injury, is not enough to avoid the effect of the Act. 416 U.S. at 761-62. Second, unlike *Investment Annuity, supra,* there could be judicial review of this legislation. As long as the state does not enact conforming legislation, the private employers, who will lose their tax credit, will be able to challenge the legislation in a suit for a refund. Moreover, if the state does not enact conforming legislation, the state is entitled

to judicial review before the Secretary of Labor's refusal to certify the state is final.[1] Thus, it appears at this stage of the litigation that the plaintiffs' suit is barred by the Anti-Injunction Act and, therefore, it would be improper for this Court to issue a preliminary injunction.

Having found that it is unlikely that the Court even has jurisdiction over this action, it is unnecessary to address the four factors the Court must consider in deciding whether to issue an injunction. However, the Court believes it is important in a case of this magnitude to discuss the four factors, assuming *arguendo* that the Anti-Injunction Act does not bar this action.

In *Virginia Petroleum Jobbers Association v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958), the court enumerated the factors that must be considered in a suit for an injunction: has the plaintiff made a strong showing that it is likely to prevail on the merits; would the denial of the injunction cause irreparable injury to the plaintiff; would the granting of the injunction cause irreparable injury to the other parties; and where does the public interest lie. The court in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d 841 (D.C. Cir. 1977), held that these factors are to be balanced and suggested that an injunction may be denied when, even though the irreparable injury to the plaintiff from such denial may be substantial, the likelihood of success on the merits is minimal. 559 F.2d at 844. In light of these precedents, the

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[1]It is unimportant that the plaintiffs have voluntarily chosen to enact the conforming legislation rather than obtain judicial review by refusing to do so. One cannot render an available review procedure an inadequate remedy (and thereby attempt to circumvent the Anti-Injunction Act) by voluntarily foregoing it. *See* Commissioner v. "Americans United" Inc., 416 U.S. 752, 762 n.13 (1974).

Court has considered the four factors and finds that, at the present time, the plaintiffs' likelihood of succeeding on the merits is minimal, the irreparable injury to the plaintiffs from the denial of the injunction could have been avoided by the plaintiffs, and the irreparable injury to the defendants – and the public interest – clearly demands that an injunction not be issued.

A. The Court Finds That It Is Unlikely That The Plaintiffs Will Prevail On The Merits In Light Of *Steward Machine Co. v. Davis,* 301 U.S. 548 (1936).

The thrust of the plaintiffs' attack on the 1976 amendments is that Congress has violated the tenth amendment because the amendments infringe upon the sovereignty of the state. Chief reliance is placed upon *National League of Cities v. Usery,* 426 U.S. 833 (1976), in which the Supreme Court held that the federal government could not impose mandatory minimum wage or hour regulations on the states with respect to their employees. The Court found that these rules violated the tenth amendment because they interfere with "integral governmental functions" of the state and would impair the state's "ability to function effectively in a federal system." 426 U.S. at 852. The plaintiffs here argue that the 1976 amendments interfere in this way because they coerce the states into adopting legislation affecting their employees and displacing personnel decisions.

The Court finds that *National League of Cities* is distinguishable from the case at bar. The regulations there were mandatory on the states; here, the imposition of an unemployment compensation scheme is at the option of the state. *See State of North Carolina ex rel Morrow v. Califano,* No. 76-0049, slip op. at 9 n.10 (E.D.N.C. Sept.

22, 1977) (3-judge court). This is crucial because the Supreme Court stressed the fact that under the regulations in *National League of Cities,* the "only 'discretion' left to" the states was how to raise the additional revenue. 426 U.S. at 848. Furthermore, the Court there stressed several times that the challenged regulations *directly* displaced the state's freedom to structure its operations. Thus, legislation that allows the state a choice — to avoid enacting a scheme that *may* interfere with its sovereignty — does not *directly* interfere with a state's sovereignty and is not in violation of the tenth amendment.[2] In fact, the 1976 amendments are supportive of the tenth amendment by allowing the states a choice and, thereby, preserving the independence of the state's decision.

The plaintiffs attempt to avoid this distinction between the amendments here and those involved in *National League of Cities* by arguing that the state's "choice" is an illusory one. Plaintiffs assert that the states are "coerced" into adopting an unemployment scheme covering former public employees. The Supreme Court in *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937), held that the unemployment compensation scheme offered as an option to the states, which was designed to induce the states to enact conforming legislation for *private* employees, did not violate the tenth amendment because the states were *not coerced* into adopting the legislation. The scheme there was virtually identical to that now before the Court, except that Congress, in the 1976 amendments, has re-

[2]This, of course, assumes that the consequences of not enacting the legislation will not interfere with the states' sovereignty. Here, the consequences of refusing to enact the legislation are a denial of a tax credit to private employers and the loss of some federal funds. *These* consequences do not in any way impair the ability of the state to function effectively in a federal system.

quired as a further condition for the tax credit to the private employers, that their state bring public employees within the umbrella of coverage of unemployment compensation. However, the same issue of whether the statutory scheme *coerced* the states into enacting the legislation, as was present in *Steward,* is present in the case here. The Supreme Court's discussion of "coercion"[3] is therefore relevant to the likelihood of the plaintiffs' success on the merits.

> The difficulty with the petitioner's contention [that the state is coerced in violation of the tenth amendment] is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky v. United States, supra.* In like manner every rebate from a tax when conditioned upon conduct is in some measure temptation. But to hold that motive or temp-

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[3]The plaintiffs attempt to distinguish the *Steward* case on the basis that the Supreme Court there stated that the states did not complain of coercion. 301 U.S. at 589. The fact that a state chooses to voice objection rather than remain silent while a private employer voices objection, as in *Steward,* should not be determinative of the outcome. This is especially true when the same indicia of coercion as was present in *Steward* exists here. At the time the case was decided, 35 of the 43 states that had enacted conforming legislation included "self-destruct" clauses. 301 U.S. at 369-370 (Oral Argument of Mr. Sterne). (Self-destruct clauses in state legislation state that if an injunction should issue restraining the enforcement of the federal legislation, this would automatically repeal the state legislation.) Plaintiffs have argued that the self-destruct clauses are indicative of coercion upon the states. Therefore, accepting the validity of the plaintiffs' contention that self-destruct clauses indicate coercion, the Supreme Court was faced with a situation similar to the present one, where several states have also enacted the self-destruct clauses. This was not enough to prove coercion in *Steward* and it is not enough now.

> tation is equivalent to coercion is to plunge the law in endless difficulties. . . Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.

301 U.S. at 590. However, the Court did place a limitation upon what Congress could use as a condition; Congress cannot condition a tax credit upon the adoption of a statute "unrelated in subject matter to activities fairly within the scope of national policy and power." 301 U.S. at 590. Moreover, the Court explicitly stated that inducement does not become coercion when the tax credit will be available "upon the doing of an act that will satisfy the fiscal need." 301 U.S. at 591.

Applying these principles to this case, the Court finds that plaintiffs are not likely to prevail on the merits. Congress's motive in enacting the 1976 amendments – to induce the states to pay for the unemployment compensation of their former employees – should not be confused with coercion. Congress has great latitude in fixing the terms upon which its money allotments (and tax credits) may be conditioned. *See Oklahoma v. Civil Service Commission,* 330 U.S. 127 (1946). One limitation, of course, as the Court in *Steward* noted, is that the condition must be within the power of Congress. This Court finds that it is within the power of Congress to attempt to deal with the problems of unemployment by inducing the states to extend unemployment compensation to public employees. Furthermore, Congress does not intrude upon fields foreign to its function by extending this credit to private employers as an incentive to the states to enact legislation that will aid the general welfare. *See Oklahoma v. Civil Service Commission, supra* at 144. Therefore, it appears at

this time that plaintiffs will have a difficult struggle to prove "coercion" so as to invoke the tenth amendment violation. Accordingly, it appears unlikely that plaintiffs will prevail on the merits.

B. The Plaintiffs Can Avoid Any Alleged Irreparable Injury By Refusing To Enact The Conforming Legislation.

The plaintiffs allege that if an injunction is not issued, they will suffer irreparable injury in that they will have to pay funds to Washington, and that they will have to fire employees and/or curtail services in order to raise the needed revenue.

The simple answer to this argument is that none of this alleged irreparable injury need result if the state elects not to enact the conforming legislation. It would then lose some federal grants for administration of its unemployment compensation program, the federal share of certain extended benefits, and the tax credit for its private employers – but it would not have to fire anyone or curtail any services.[4] Furthermore, if a state chose not to enact the legislation, no adverse consequences at all would result until the state received a full judicial determination of the Secretary of Labor's refusal to certify the state. Thus, any injury to the plaintiff would not now be imminent if the state had decided not to enact the conforming legislation.

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[4]Plaintiffs have alleged that if they refuse to enact the legislation, they will be injured in that the denial of the tax credit will induce private employers to leave the state and other private employers not to move to the state. The Court finds this allegation far too speculative at this time at this stage of the litigation.

Even if a state did choose to adopt the unemployment compensation scheme, the United States will reimburse a state for all liability for unemployment paid for weeks prior to July 1, 1978. Thus, the plaintiffs need not pay any money at the present time, nor will they be liable for any money, until several months hence. In fact, the plaintiffs have not shown that, if they do pay any money to Washington, they cannot recoup this amount later if they prevail on the merits. As the defendants point out, if plaintiffs are ultimately successful, they can obtain a tax refund and will have suffered no loss of funds. *See* Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Application for Preliminary Injunction, at 35 (Dec. 14, 1977).

Accordingly, the Court finds that any irreparable injury that the plaintiffs may suffer as a result of the denial of an injunction could be avoided by refusing to enact or by repealing the conforming legislation. Furthermore, the amount of money that the states will have to place into the trust will be vastly diminished by the fact that the United States will reimburse much of it for the first year. Moreover, the Court will attempt to resolve this entire issue as soon as practicable so as not to cause any undue injury to the states should they enact the conforming legislation.

C. The Issuance Of An Injunction Will Deny Unemployment Compensation Benefits To Public Employees And Will Thereby Cause A Substantial Irreparable Injury To The Defendants' Interest And The Public Interest.

If an injunction is issued, public employees will not be covered under any unemployment compensation plan (un-

less the state has voluntarily enacted legislation to cover them). The reason for this is that until the present time, these employees have been covered by the Special Unemployment Assistance program, funded by the Federal government. However, this program, created as a temporary one, will expire on December 31, 1977. Therefore, unless states enact legislation to cover these employees, they will not receive unemployment compensation.

The Court finds that there is a strong public interest in preventing some 2 million state employees and some hundreds of thousands of local government employees from becoming unemployed without economic resources. Lack of such coverage could result in the inability to meet the rising costs of foods, clothing, shelter, etc. This would certainly be irreparable injury — to these individuals and to society in general. Thus, the injunction will not be issued at this time.[5]

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[5]The suggestion has been made, in some of the papers and at oral argument, that the failure to issue the injunction here will result in virtual bankruptcy of some cities and states throughout the country if such entities must pay unemployment benefits to some 2 million state and some hundreds of thousands of local employees who may become eligible. The Court notes these allegations with sadness; this Court has merely done its duty to apply the law in a case of first impression under the tenth amendment to the Constitution. The Court is confident that a concerted effort by federal executive, legislative, and state and local branches of government can and must find a solution to the social and economic problems involving the people and governmental entities which are affected directly and indirectly by the issues raised herein.

III. CONCLUSION

The Court will therefore deny the plaintiffs' and the intervenor-plaintiffs' motion for a preliminary injunction. At this stage of the litigation, it does not appear to the Court that the plaintiffs will be able to maintain this suit because of the Anti-Injunction Act. Furthermore, even if the Act does not bar this suit, it appears unlikely at this stage that the plaintiffs will be able to prevail on the merits. The irreparable injury to the public should an injunction be issued clearly outweighs the avoidable injury which the plaintiffs may suffer if the injunction is granted.

An Order in accordance with the foregoing will be issued of even date herewith.

[s] Charles R. Richey
Charles R. Richey
United States District Judge

Date: December 29, 1977

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNTY OF LOS ANGELES, CALIFORNIA THE STATE OF SOUTH CAROLINA, et al., Plaintiffs,	:	
LOUISIANA MUNICIPAL ASSOCIATION, CITY OF NEW ORLEANS, LOUISIANA, et al., Plaintiff-Intervenors,	:	
v.	:	C.A. No. 77-2023
HONORABLE F. RAY MARSHALL, SECRETARY, UNITED STATES DEPARTMENT OF LABOR; HONORABLE W. MICHAEL BLUMENTHAL, SECRETARY, UNITED STATES DEPART- MENT OF TREASURY; HONORABLE JAMES KURTZ, COMMIS- SIONER OF INTERNAL REVENUE SERVICE OF THE UNITED STATES Defendants,	:	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES; AMERICAN FEDERATIONS OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, Defendant-Intervenors.	:	

ORDER

Upon consideration of the plaintiffs' and intervenor-plaintiffs' motion for a preliminary injunction, the memoranda filed in support thereof and in opposition

thereto, and the oral argument and testimony heard on the matter, it is, by the Court, this 29th day of December, 1977,

ORDERED, that the motion for a preliminary injunction be, and the same hereby is, denied.

[s] Charles R. Richey
Charles R. Richey
United States District Judge

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions Alleged to Be Violated

The Constitution of the United States provides, in relevant part:

ARTICLE I, SECTION 8:

The Congress shall have power to lay and collect taxes, duties, imposts and excises . . . but all duties, imposts and excises shall be uniform throughout the United States.

ARTICLE IV, SECTION 4:

The United States shall guarantee to every state in this union a republican form of government . . . .

AMENDMENT V:

[N]or shall any person . . . be deprived of life, liberty or property, without due process of law . . . .

AMENDMENT X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutory Provisions Alleged to Impose a Public Worker Benefit Program

The provisions of the Federal Unemployment Tax Act (FUTA), §3301 *et seq.* of the Internal Revenue Code of

1954 as amended, 26 U.S.C., imposing federal standards for a public-sector program of unemployment benefits[1] are:

SEC. 3306. DEFINITIONS.

* * *

(c) Employment. – For purposes of this chapter, the term "employment" means any service . . . except -

* * *

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is –

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by

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[1]The exclusions from federal tax contained in I.R.C. §3306(c)(6)-(7) have been present since the original enactment of the federal unemployment provisions as Title III of the Social Security Act of 1935, c.531, 49 Stat. 620.

The benefit provisions of §§3304 and 3309 respecting state and local government employment were added by amendments in 1970, Pub. L.No. 91-373, §104, 84 Stat. 695, and in 1976, Pub.L.No. 94-566, §115, 90 Stat. 2667. Minor technical amendments were made by §§ 301 and 302 of Pub.L.No. 95-19, 91 Stat. 39. Each of these public laws also modified provisions of the private-sector unemployment benefit program, which was not challenged below.

one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;

* * *

SEC. 3304. APPROVAL OF STATE LAWS.

(a) Requirements. – The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that –

* * *

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to

the same conditions as compensation payable on the basis of other service subject to such law; except that –

(i) with respect to services in an instructional, research, or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms,

(ii) with respect to services in any other capacity for an educational institution (other than an institution of higher education) to which section 3309(a)(1) applies, compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms,

(iii) with respect to any services described in clause (i) or (ii), compensation payable on the basis of such services may be denied to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess,

(iv) with respect to any services described in clause (i) or (ii), compensation payable on the basis of services in any such capacity may be denied as specified in clauses (i), (ii), and (iii) to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions, and

(B) payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in section 3309(a)(2);

* * *

SEC. 3309. STATE LAW COVERAGE OF SERVICES PERFORMED FOR NONPROFIT ORGANIZATIONS OR GOVERNMENTAL ENTITIES.

(a) State Law Requirements. – For purposes of section 3304(a)(6) –

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are –

* * *

(B) service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c); and

(2) the State law shall provide that a governmental entity or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

(b) Section Not To Apply To Certain Service. – This section shall not apply to service performed –

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a governmental entity referred to in paragraph 7 of section 3306(c), if such service is performed by an individual in the exercise of his duties—

(A) as an elected official;

(B) as a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof;

(C) as a member of the State National Guard or Air National Guard;

(D) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or

(E) in a position which, under or pursuant to the State law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week;

(4) in a facility conducted for the purpose of carrying out a program of—

(A) rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or

(B) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market,

by an individual receiving such rehabilitation or remunerative work;

(5) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual receiving such work relief or work training; and

(6) by an inmate of a custodial or penal institution.

* * *

Statutory Provisions Alleged to Coerce State Conformance to Public Worker Benefit Requirements

The provisions of the Federal Unemployment Tax Act securing compliance by the states[2] with the above federal benefit requirements are:

SEC. 3306. DEFINITIONS.

(a) Employer. For purposes of this chapter –

(1) In General. – The term "employer" means, with respect to any calendar year, any person who –

* * *

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day.

* * *

[2]These provisions have remained unchanged, except for modification of the rates of tax and credit, since their original enactment in the Social Security Act of 1935, c.531, 49 Stat. 620.

(c) Employment.– For purposes of this chapter, the term "employment" means any service . . . except –

* * *

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;

* * *

SEC. 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for each calendar year an excise tax, with respect to having individuals in his employ, equal to–

(1) 3.4 percent, in the case of a calendar year beginning before the first calendar year after 1976, as of January 1 of which there is not a balance of repayable advances made to the extended unemployed compensation account (established by section 905(a) of the Social Security Act); or

(2) 3.2 percent, in the case of such first calendar year and each calendar year thereafter;

of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

SEC. 3302. CREDITS AGAINST TAX.

(a) Contributions to State Unemployment Funds. –

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 3301 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified as provided in section 3304 for the 12-month period ending on October 31 of such year.

* * *

(c) Limit on Total Credits. –

(1) The total credits allowed to a taxpayer under this section shall not exceed 90% of the tax against which such credits are allowable.

* * *

(d) Definitions and Special Rules Relating to Subsection (c). –

(1) Rate of Tax Deemed to Be 3 Percent. – In applying subsection (c), the tax imposed by section 3301 shall be computed at the rate of 3 percent in lieu of the rate provided by such section.

* * *

APPENDIX J

Brief for the Respondent submitted by Solicitor General in *Steward Machine Co. v. Davis,* No. 837, Oct. T. 1936 (Pages 29-30 40-43).

[29]

* * *

SUMMARY OF ARGUMENT

I

Title IX is a valid exercise of the power of Congress "to lay and collect Taxes * * * and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Constitution, Article I, Section 8, Clause 1.

This tax has the indicia of a revenue measure. Being laid upon the privilege of receiving services it is a valid excise, and, under the rule enunciated in *Florida* v. *Mellon,* 273 U. S. 12, it satisfies the constitutional canon of uniformity. It will raise substantial revenue, for even if the maximum available credits are utilized it will yield the Treasury of the United States amounts estimated to range from $22,000,000 to $90,000,000. Even if, in laying the tax, Congress acted with an eye to public policy, this Court will not on that account invalidate the tax. *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937; *Florida* v. *Mellon, supra.*

[30]

If the policies of Congress in enacting this tax are to be considered, they bear a reasonable relation to the power granted in Article I, Section 8, Clause 1, since they are concerned only with the raising and spending of money for the general welfare of the United States. One policy is to make financial provision for the unemployed, thus relieving a drain which creates "unparalleled demands for relief" from the federal treasury. *West Coast Hotel Co.* v. *Parrish,* No. 293, October Term, 1936, March 29, 1937. Another policy is to mitigate double taxation. *Florida* v. *Mellon, supra.*

These policies are not only reasonably related to the power conferred by Article I, Section 8, Clause 1, but have been executed in a method specifically sanctioned by this Court. It is already established by decisions that a policy relating to the taxing and spending powers may be executed by a tax and credit. *Florida* v. *Mellon, supra.* Moreover, where the credit is made available only where the financial needs of the national government are met by the States, the tax and credit must be regarded as valid in view of the words of the Constitution, the expressions of the Framers of the Constitution (*Federalist,* Lodge ed., Nos. 36 and 45; *Farrand, Records* of the *Constitutional Convention,* Vol. 3, pp. 99–100), nineteenth century legislative precedent (Act of May 13, 1862, c. 66, 12 Stat. 384) and the plain objective of Article I, Section 8, clause 1.

[40]

* * *

I

TITLE IX IS A VALID EXERCISE OF THE POWER CONFERRED ON CONGRESS BY UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 1

Title IX is an exercise of the power of Congress "To lay and collect Taxes * * * and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Constitution, Article I, Section 8, Clause 1.

We shall here show that Title IX lays a true "tax": it has the indicia of a tax, it is laid upon a proper subject for an excise, it is uniform, and it produces revenue. If it is proper, which we submit it is not, to consider the policies that led Congress to enact this statute, we then show that the policies correspond both in purpose and in the method of execution with the letter and the spirit of Article I, Section 8, Clause 1.

Like all revenue measures, this statute originated in the House of Representatives.[18] Hearings were had before the House Committee on Ways

[18] The bill which was finally enacted was introduced in the House of Representatives as H. R. 7260 on April 4, 1935, 74th Cong., 1st Sess.

and Means and before the Senate Committee on Finance,[79] these being the committees generally charged with the consideration of tax statutes.[80]

Title IX on its face as well as in its operation is a true exercise of the taxing power. It imposes an excise tax on the receipt of services or on the privilege of employing individuals. That the subject is a proper one for an excise is indicated by *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937, and the authorities collected in Appendix C. Moreover, it is clear that the excise satisfies the canon of uniformity, inasmuch as "the rule of liability is the same in all parts of the United States." [81]

The amount of the tax is proportioned to the extent that the privilege is utilized. Section 901. The Bureau of Internal Revenue under the direction of the Secretary of the Treasury is charged with the duty of collection. Section 905 (a). The administrative provisions generally found in revenue statutes relating to the filing of returns, refunds, penalties and the like are likewise present here. Section 905. The tax proceeds are paid

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[79] The House hearings (January 21 to February 12, 1935) were held on H. R. 4120, and the Senate hearings (January 22 to February 20, 1935) were held on S. 1130, both bills being predecessors of the bill finally enacted.

[80] Contrast in this respect the Agricultural Adjustment Act, which, although in form a revenue measure, was handled by the respective committees on Agriculture in the House and Senate.

[81] *Florida* v. *Mellon,* 273 U. S. 12, 17; *Poe* v. *Seaborn,* 282 U. S. 101, 117; *Knowlton* v. *Moore,* 178 U. S. 41.

into the Treasury of the United States as internal-revenue collections. Section 905 (a). Being mingled in the Treasury with other internal-revenue collections, these proceeds, unlike those considered in *United States* v. *Butler*, 297 U. S. 1, 61, are not ear-marked or related in any way to some special purpose, but are subject to any appropriation for the general support of the Government.

Further, Title IX is so constructed as to produce substantial revenue. From the outset Congress was deeply concerned with anticipated yield. Estimated receipts, without taking into account the 90 percent deduction, range from over $225,000,000 in the first year to over $900,000,000 after the Act has been in operation for a period of years.[82] Thus,

[82] The Senate Committee on Finance, recommending a tax on employers of *four* or more, estimated the yield as follows (S. Rep. No. 628, 74th Cong., 1st Sess., p. 27):

TABLE XII.—*Revenue estimates (from tax on employers of 4 or more under title IX, with no allowance for 90-percent credit)*

Calendar year with respect to which tax is levied	Fiscal year received into Treasury	Estimated receipts	Rate of tax
			Percent
1936	1937	$247,000,000	1
1937	1938	590,000,000	2
1938	1939	826,000,000	3
1939	1940	831,000,000	3
1940	1941	838,000,000	3
1942	1943	849,000,000	3
1945	1946	876,000,000	3
1950	1951	908,000,000	3

NOTE.—The tax levied by title IX is subject to a credit of 90 percent of the amount of such tax for contributions into State unemployment funds. Therefore the minimum amount of

even if the maximum credits are available to all taxpayers in all States, the minimum estimated receipts from Title IX would range from at least $22,000,000 to at least $90,000,000.

These receipts pass unrestricted into the Treasury of the United States and are available for the general support of the Government. Even if, by a *tour de force* which ignores the separable nature of the statute, expenditures under Title III are debited entirely to the funds raised by Title IX, there will still remain a substantial balance for other governmental purposes. See Point IV, pp. 122–123, *infra*.

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revenue each year from this tax will be 10 percent of the above amounts. What part of the above estimates, greater than 10 percent of same, will be retained by the Treasury is problematical, being dependent on the number of States enacting unemployment insurance laws, and the rates and coverage thereof.

The House Committee on Ways and Means, recommending a tax on employers of *ten* or more, estimated the yield as follows (H. Rep. No. 615, 74th Cong., 1st Sess., p. 15):

TABLE XI.—*Revenue estimates (from tax on employers of 10 or more under title IX, with no allowance for 90-percent credit)*

Calendar year with respect to which tax is levied	Fiscal year received into Treasury	Estimated receipts	Rate of tax
			Percent
1936	1937	$228,000,000	1
1937	1938	501,000,000	2
1938	1939	786,000,000	3
1939	1940	803,000,000	3
1940	1941	820,000,000	3
1942	1943	846,000,000	3
1945	1946	872,000,000	3
1950	1951	900,000,000	3

NOTE.—The tax levied by title IX is subject to a credit of 90 percent of the amount of such tax for contributions into State unemployment funds. Therefore the minimum amount of revenue each year from this tax will be 10 percent of the above amounts. What part of the above estimates greater than 10 percent of same, will be retained by the Treasury is problematical, being dependent on the number of States enacting unemployment insurance laws, and the rates and coverage thereof.